New York Paving, Inc. *and* Construction Council Local 175, Utility Workers Union of America, AFL–CIO *and* Elijah Jordan. Cases 29–CA–233990 and 29–CA–234894

November 9, 2020

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On January 27, 2020, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions,[4] except as set forth below, and to adopt the judge's recommended Order as modified and set forth in full below.[5]

DISCUSSION

The Respondent provides asphalt and concrete paving services for utility companies in the five boroughs of New York City; specifically, it repairs streets and sidewalks after a utility has performed work underground. The Respondent employs workers represented by Local 175, who have historically performed asphalt paving, and workers represented by Highway Road and Street Construction Laborers Local Union 1010, District Council of Pavers and Builders, Laborers International Union of North America, AFL–CIO (Local 1010), who have historically performed concrete paving. Since 2007, Local 175 has been the 9(a) representative of the Respondent's employees in the Local 175 bargaining unit. The violations in this case concern the unilateral transfer of three types of temporary asphalt paving: emergency keyhole work, which the Respondent performs for Hallen, a subcontractor for utility company Consolidated Edison (ConEd);[6] Code 92 work, which the Respondent performs for Hallen and for utility company National Grid; and Code 49 work, which the Respondent performs for National Grid.[7]

1. Emergency keyhole work

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring emergency keyhole work from Local 175 to Local 1010.[8] Emergency keyhole work involves saw cutting (squaring off the hole in the street left by Hallen), excavating and backfilling the hole with concrete, and covering the backfilled hole with a patch of temporary asphalt. In 2017, the Respondent renegotiated its contract with Hallen. The new contract, which went into effect on January 9, 2018, included ConEd's revised standard contract terms, which required that workers on its projects be represented by unions belonging to the New York City Building and Construction Trades Council (BCTC). The Respondent admits that, because Local 175 did not belong to BCTC and Local 1010 did, it transferred emergency keyhole work from Local 175 to Local 1010. The Respondent also admits that it did so without giving Local 175 notice and an opportunity to bargain. Citing *Southern Mail*, 345 NLRB 644, 645 fn. 8 (2004), however, the Respondent argues it had no duty to bargain with Local 175 in this instance

[1] Chairman Ring took no part in the consideration of this case.

[2] We find that the judge abused her discretion by reopening the record to admit, *sua sponte*, the collective-bargaining agreement between Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175) and the Respondent. Accordingly, we do not rely on the agreement or the judge's discussion of it. The judge's error was harmless, however, because it does not affect our finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by transferring bargaining unit work without notice and opportunity to bargain, as discussed below. Member McFerran finds it unnecessary to pass on whether the judge abused her discretion by admitting the collective-bargaining agreement *sua sponte* because, assuming the judge did err, it was a harmless error.

We find it unnecessary to pass on the Respondent's exception that the judge abused her discretion by failing to draw an adverse inference against the General Counsel for not seeking to admit the collective-bargaining agreement between the Respondent and Local 175. Even assuming the judge did err in this regard, it was a harmless error.

[3] Some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In addition, we find it unnecessary to pass on the Respondent's exceptions to the judge's analysis of the Sec. 8(a)(1) and (3) allegations because the judge ultimately dismissed those allegations.

[4] We have amended the judge's conclusions of law consistent with our findings herein.

[5] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

[6] The emergency keyhole work at issue here is only the work performed in streets.

[7] There are no exceptions to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally transferring flagging work on milling and paving crews.

[8] In finding this violation, we agree with the judge that the transfer of emergency keyhole work was a material, substantial, and significant change and that Local 175 filed the charge within the Sec. 10(b) period. We do not rely on *RBE Electronics of S.D.*, 320 NLRB 80 (1995), because the Respondent does not argue that economic exigency was a reason it did not bargain with Local 175.

because it had no control over the changes to ConEd's standard contract terms. We reject this argument.

The instant case is distinguishable from *Southern Mail*. In that case, the respondent was a contractor performing mail carrier work for the United States Postal Service (USPS). During the term of its contract with the respondent, the USPS made changes to a delivery route without consulting the respondent. The respondent then made additional unilateral changes to that route without notifying the union. The Board found that the respondent violated Section 8(a)(5) and (1) by implementing its additional changes, but did not violate the Act by implementing the changes mandated by the USPS. In this case, by contrast, the Respondent was fully aware of the revisions to ConEd's standard contract terms at the time that it voluntarily entered into its new contract with Hallen. Accordingly, the Respondent was aware that ConEd's BCTC requirement created a foreseeable issue regarding work assignment to Local 175–represented employees, and it could have addressed and resolved this issue when it renegotiated its contract with Hallen in 2017. Because the Respondent apparently did not do so, however, it now finds itself unable to satisfy its obligations to both Hallen and Local 175. Again, because the Respondent chose to enter into the contract with Hallen, despite its knowledge of the BCTC requirement, it cannot now argue that it is excused from bargaining with Local 175 as a result of the terms of that agreement.

The Board's decision in *Tri-Messine Construction Co.*, 368 NLRB No. 149 (2019), is also instructive. In *Tri-Messine*, the respondent had a collective-bargaining agreement with Local 175 as well as a contract with ConEd. After ConEd revised its standard contract terms to include the BCTC requirement, the respondent created another paving company which recognized Local 1010 and began performing work for ConEd. The Board found that the respondent and the new company were alter egos and that the respondent violated Section 8(a)(5) and (1) of the Act by, among other things, failing to apply the Local 175 contract to its alter ego's employees. Id., slip op. at 1. The Board specifically found that "the [r]espondent's argument that it was authorized to act pursuant to the doctrine of impossibility fails because . . . bargaining was still possible." Id., slip op. at 1, fn. 2 (2019). Although the instant case involves a different factual scenario, the Respondent's argument is essentially the same: that it was not required to bargain with Local 175 because ConEd's standard contract terms prevented it from assigning work to Local 175–represented employees. As in *Tri-Messine Construction*, however, we find that bargaining was still possible here.

Accordingly, we find that the change to ConEd's standard contract terms did not excuse the Respondent from its duty to bargain with Local 175 about the transfer of emergency keyhole work to non-unit employees, and therefore, that the Respondent violated Section 8(a)(5) and (1) of the Act.

2. Code 92 and Code 49 work

We also agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring Code 92 and Code 49 work from Local 175 to Local 1010. As explained below, however, we do not rely on the Respondent's collective-bargaining agreement with Local 175. Rather, we find these violations based solely on the Respondent's past practice of assigning temporary asphalt paving work to Local 175. See *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 158, slip op. at 11 (2017), enfd. mem. 783 Fed.Appx 1 (D.C. Cir. 2019).

a. Code 92 work

The Respondent performs Code 92 work for National Grid and Hallen. This work involves covering a backfilled hole on a sidewalk with temporary asphalt so that the Respondent can later safely operate its saws around the hole. The Respondent admits that it assigned Code 92 work to Local 175 until fall 2018, when it transferred that work to Local 1010. It also admits that it transferred that work without first notifying Local 175 and giving it the opportunity to bargain. The Respondent argues that it was both required to transfer the work and permitted to do so without bargaining because of our decision in *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 (2018) (*New York Paving I*). We disagree. In *New York Paving I*, we awarded certain work *ancillary to paving* to Local 1010–represented employees, including saw cutting and excavating. Temporary asphalt paving was not in dispute at that time, and we did not award that work to Local 1010–represented employees. We also agree with the judge that there is no evidence that the Code 92 application of temporary asphalt and the subsequent saw cutting occur so close together in time as to constitute a single integrated process. Accordingly, we find the Respondent violated Section 8(a)(5) and (1) by transferring Code 92 work without first giving Local 175 notice and an opportunity to bargain.

b. Code 49 work

The Respondent performs Code 49 work for National Grid. This work involves covering a backfilled hole in a street with asphalt so that the Respondent can later safely operate its saws around the hole. Unlike Code 92 work, however, the Respondent did not perform Code 49 work until summer 2018, after its collective-bargaining agreement with Local 175 expired on June 30, 2018. The

Respondent contends that because Local 175 did not perform Code 49 work during the term of the collective-bargaining agreement, it neither transferred Code 49 work from Local 175 to Local 1010 nor had any obligation to bargain with Local 175 over the assignment of that work. We are not persuaded by these arguments.

The Respondent is required to maintain the status quo for established terms of employment after the expiration of a collective-bargaining agreement, including those established by past practice. *NLRB v. Katz*, 369 U.S. 736 (1962). The Respondent has historically assigned temporary asphalt work, such as Code 92 work and emergency keyhole work, to Local 175. There is also no evidence that the Respondent permanently assigned any temporary asphalt work to employees outside the Local 175 bargaining unit until the unilateral transfer of emergency keyhole work in January 2018. Therefore, by assigning Code 49 work to Local 1010, the Respondent departed from its admitted past practice of assigning such work to Local 175 and, in effect, transferred temporary asphalt paving work from Local 175.

Further, we reject the Respondent's argument that *New York Paving I* required the transfer of Code 49 work to Local 1010–represented employees for the same reasons we rejected its argument with respect to Code 92 work above.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by transferring Code 49 work outside the Local 175 bargaining unit without giving Local 175 notice and an opportunity to bargain.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 4.

"4. Respondent violated Section 8(a)(5) and (1) of the Act by transferring Local 175 bargaining unit work, including emergency keyhole work, Code 92 work, and Code 49 work, to non-unit employees without providing Local 175 with notice and the opportunity to bargain."

Delete Conclusion of Law 3 and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, New York Paving, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring bargaining unit work, including emergency keyhole work, Code 92 work, and Code 49 work, to non-unit employees, without first notifying Construction Council Local 175, Utility Workers Union of America, AFL–CIO (the Union or Local 175) and giving it an opportunity to bargain with respect to this conduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral transfer of bargaining unit work, including emergency keyhole work, Code 92 work, and Code 49 work, to non-unit employees.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of Local 175–represented employees.

(c) Make Local 175 bargaining unit employees whole for any lost earnings and other benefits suffered as a result of the unilateral transfer of bargaining unit work outside the bargaining unit, in the manner set forth in the remedy section of the decision.

(d) Compensate Local 175 bargaining unit employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Long Island City, New York facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for

[9] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 9, 2020

Marvin E. Kaplan, Member

William J. Emanuel, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally transfer bargaining unit work, including emergency keyhole work, Code 92 work, and Code 49 work, to non-unit employees without first notifying Construction Council Local 175, Utility Workers Union of America, AFL–CIO (the Union or Local 175) and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unilateral transfer of bargaining unit work, including emergency keyhole work, Code 92 work, and Code 49 work, to non-unit employees.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our Local 175–represented employees.

WE WILL make Local 175 bargaining unit employees whole for any lost earnings and other benefits suffered as a result of our unlawful unilateral transfer of bargaining unit work, plus interest.

WE WILL compensate Local 175 bargaining unit employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

NEW YORK PAVING, INC.

The Board's decision can be found at https://www.nlrb.gov/case/29-CA-233990 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Noor I. Alam, Esq., for the General Counsel.
Eric B. Chaikin, Esq. (Chaikin & Chaikin), of New York, New York, for the Charging Party.
Jonathan D. Farrell, Esq. and *Ana Getiashvili, Esq. (Meltzer, Lippe, Goldstein & Breitstone, LLP),* of Mineola, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. This case was tried before me in Brooklyn, New York, on July 15 through 18, 2019, and August 14, 2019. On January 14, 2019, Elijah Jordan filed a charge in Case No. 29–CA–233990 against New York Paving, Inc. (NY Paving), and on January 29, 2019, Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175) filed a charge in Case No. 29–CA–234894 against the company. On April 30, 2019, the Regional Director, Region 29, issued an Order Consolidating Cases, amended consolidated complaint and Notice of Hearing alleging that NY Paving violated Section 8(a)(1) and (3) of the Act by discharging Elijah Jordan in retaliation for his support for, assistance to, and/or affiliation with Local 175. The consolidated complaint further alleges that NY Paving violated Section 8(a)(1) and (5) of the Act by transferring work subject to its collective-bargaining agreement with Local 175 to nonbargaining unit employees.[1] The consolidated complaint also alleges that NY Paving, by its agent Steven Sbarra, violated Section 8(a)(1) by interrogating employees regarding their affiliation with Local 175, and by threatening employees with discharge in retaliation for their support for and affiliation with Local 175. NY Paving filed an answer on May 8, 2019, denying the consolidated complaint's material allegations.[2]

As discussed in further detail below, the parties in the instant case have been involved in previous cases before the agency. On April 5, 2019, Judge Andrew S. Gollin issued a decision in *New York Paving, Inc.*, JD–33–19, to which no exceptions were filed. On August 24, 2018, the Board issued a Decision and Determination of Dispute in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174, a 10(k) proceeding involving NY Paving, Local 175, and Highway Road and Street Construction Laborers Local 1010, District Council of Pavers and Builders, Laborers International Union of North America, AFL–CIO (Local 1010). I took administrative notice of both of these decisions during the hearing in this matter. (Tr. 685.)

On November 13, 2019, NY Paving filed a motion to re-open the record to admit several documents into evidence. Counsel for the General Counsel (General Counsel) and Local 175 filed Oppositions, and NY Paving filed a Reply. I granted NY Paving's motion by Order dated December 10, 2019, and admitted the documents into evidence as Respondent's Exhibit 24. My December 10, 2019 Order also supplemented the record by admitting into evidence as ALJ Exhibit 1 the collective-bargaining agreement between NY Paving and Local 175 dated July 1, 2014 through June 30, 2017. A copy of my December 10, 2019 Order is attached hereto as Appendix B.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, NY Paving, and Local 175, I make the following

FINDINGS OF FACT

I. JURISDICTION

NY Paving, a corporation with an office and place of business in Long Island City, New York, provides asphalt and concrete paving services. NY Paving admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. New York Paving also admits, and I find, that Local 175 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties and Respondent's Operations

NY Paving provides asphalt and concrete paving services for utilities in the five boroughs of New York City, repairing streets and sidewalks after a utility has performed work underground. New York Paving's clients include the utility companies National Grid and Consolidated Edison (ConEd), and The Hallen Construction Co., Inc. (Hallen), a company which contracts with National Grid and ConEd to provide construction and paving services. (Tr. 421–423, 897–898.)

NY Paving employs approximately 500 employees, 250 to 300 of whom work out of its yard in Long Island City. In addition to its collective-bargaining relationship with Local 175, NY Paving has a long-standing collective-bargaining relationship with Local 1010. NY Paving also has collective-bargaining relationships with International Union of Operating Engineers, Local 14–15, International Brotherhood of Teamsters, Local 282, and several other building trades unions in the New York City area. (Tr. 837–838.)

The instant case involves asphalt and concrete work, and NY

[1] The consolidated complaint also alleged that NY Paving violated Sec. 8(a)(1) and (5) by unilaterally implementing a policy of issuing write-ups for excessive absences that had not been previously approved, and by unilaterally implementing a policy requiring employees performing work covered by the Local 175 collective-bargaining agreement to provide a doctor's note for absences. These allegations were withdrawn by an Order issued by the Regional Director, Region 29, on June 5, 2019.

[2] At the outset of the hearing, General Counsel moved to strike the portion of NY Paving's Answer denying that it unilaterally transferred emergency keyhole work encompassed by the Local 175 collective bargaining agreement to non-bargaining unit employees. I denied General Counsel's motion, because at that point the precise scope of the work that General Counsel was contending had been unlawfully unilaterally transferred was not clear. (Tr. 40–48.)

Paving's relationships with Local 175 and Local 1010. Local 175 and Local 1010 have been the certified collective-bargaining representatives of their respective units since October 16, 2007 (Local 175) and January 5, 2006 (Local 1010). *New York Paving, Inc.*, JD–33–19 at p. 4–5. Local 175's certification describes its bargaining unit as follows:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

New York Paving, Inc., JD–33–19 at p. 4.

NY Paving stipulated during the hearing before Judge Gollin in *New York Paving, Inc.*, JD–33–19, that it adopted the terms of Local 175's collective-bargaining agreement with the Independent Contractor's Alliance, Inc. (NYICA) by conduct, although NY Paving is not a member of NYICA. This collective-bargaining agreement was effective by its terms from July 1, 2014 through June 30, 2017, and NY Paving stipulated that the contract's terms continued through June 30, 2018. The contract covers "All Asphalt Paving work," defined as follows:

> (a) Prepare for and perform all types of asphalt paving, slurring including methacrylate and other similar materials and milling of streets and roads, and all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all materials, install and repair fences and all incidential work thereto to continue into parks, plazas, malls, housing projects, playgrounds, said work including but not limited to public highways and roads and bridges; including, but not limited to all subsequent work prior to final paving.
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> (b) All asphalt slurry (protective polymer) restoration work, including all preparation for slurry and all bridges, temporary asphalt paving necessary on streets, sidewalks and private property and federal, city, local and state and roads subsequent to subway, sewer, water main, duct line construction and other similar type jobs.
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> (c) Any laboring work related to the preparation and cleanup of all Turf and all material, used as a base for Turf including drainage, all landscaping, all labor relating to planting and maintenance, cleanup, installation and removal of play equipment, slurry/seal-coating, line striping and sawcutting, shall be performed by persons under the jurisdiction of Local 175.
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> (d) Maintenance and protection of traffic safety for all work sites.
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> (e) All other General Construction work related to Asphalt Paving
>
> (f) Safety Watchman
>
> Signaling in connection with the handling of materials, watchmen on all construction sites, Traffic control and all elements to ensure a safe work environment.

ALJ Exh. 1, p. 9 (Article VIII); see also *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3. The collective-bargaining agreement explicitly states that Local 175 has been recognized as an exclusive collective-bargaining representative pursuant to Section 9(a) of the Act. ALJ Exh. 1, p. 2 (Article I).

Local 1010's certification describes its bargaining unit as follows:

> All full-time and regular part-time site and grounds improvement, utility, paving & road building workers who primarily perform the laying of concrete, concrete curb setting, or block work, including foremen, form setters, laborers, landscape planting and maintenance employees, fence installers and repairers, slurry/seal coaters, play equipment installers, maintenance safety surfacers and small power tools and small equipment operators, who work primarily in the five boroughs of New York City.

New York Paving, Inc., JD–33–19 at p. 4–5. Local 1010's collective-bargaining agreement also covers "the removal of old pavement, curbs, and sidewalks to the subgrade," "operating small power tools and…equipment," "landscaping which is incidental to paving work and encompasses…the planting and maintenance of trees, shrubs, grass, beach grass, and similar plant matter," and "maintenance and protection of traffic safety for work under the Local's jurisdiction." *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3.

The collective-bargaining agreement between Local 175 and NY Paving contains several other provisions which are relevant here. Article I, Section 2(f) provides that NY Paving "is at liberty to employ and discharge whomsoever [it sees] fit," and states that NY Paving "shall at all times be the sole judge as to the work to be performed and whether such work performed by an [e]mployee is or is not satisfactory." (ALJ Exh. 1, p. 5; see also *New York Paving, Inc.*, JD–33–19 at p. 5, fn. 8.) Article IV of the collective-bargaining agreement between NY Paving and Local 175 contains a provision for the contract's renewal as follows:

> This Agreement shall continue in effect until and including June 30, 2017, and during each year thereafter unless on or before the fifteenth (15th) day of March 2017, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party.
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> In the event that written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed by June 30th of the year in which notice shall have been served.

(ALJ Exh. 1, p. 7; see also R. Exh. 20, at p. 7–8.)[3] Finally, it

[3] In an action for a declaratory judgment filed in the United States District Court for the Eastern District of New York on May 18, 2018, NY Paving contends that it provided Local 175 with notice terminating the contract on February 18, 2018. (R. Exh. 20, p. 8 (Case 1:18–cv–

should be noted that the collective-bargaining agreement between Local 175 and NY Paving does not contain any management rights clause. (ALJ Exh. 1.)

Peter Miceli is NY Paving's director of operations, and oversees all work performed by the company in New York City and at the Long Island City yard. (Tr. 421, 836.) Miceli has been director of operations for 22 years, and reports to Anthony Bartone, Jr., one of NY Paving's owners. (Tr. 837; see *New York Paving, Inc.*, JD–33–19, at p. 3.) Miceli also works with New York Paving's Attorney Bob Coletti. (Tr. 837.) Robert Zaremski is NY Paving's operations manager and is responsible for routes and crews performing asphalt work out of the Long Island City yard. (Tr. 491–492.) Louis Sarro is similarly responsible for routes and crews performing concrete work out of the Long Island City yard. (Tr. 785–787.) Miceli, Zaremski, and Sarro all testified at the hearing. Terry Holder is employed by NY Paving and is the current shop steward for the asphalt workers represented by Local 175. (Tr. 219–220.) Steven Sbarra is the current shop steward for Local 1010, and performs similar functions for the concrete workers in that bargaining unit. (Tr. 161.) Holder testified at the hearing, but Sbarra did not.

Local 175's Business Manager Charlie Priolo and attorney Eric B. Chaikin, Esq. testified at the hearing for General Counsel, as did alleged discriminatee Elijah Jordan. (Tr. 353, 631.) Local 1010's Secretary-Treasurer Francisco Fernandez, NY Paving's attorney Jonathan Farrell, foremen William Cuff, Michael Whelan, and Joseph Stine, and employee Tomasz Zywiec also testified on Respondent's case. (Tr. 687, 712–713, 726–727, 745, 754–755, 1033.)

B. Background and Previous Proceedings

Miceli testified without contradiction that NY Paving's relationship with Local 175 was generally good until the fall of 2016. Tr. 838. At that time, the New York City Department of Transportation (NYCDOT) announced changes in its regulations for construction on city streets, so that every repair was required to have a concrete base. (Tr. 872–873, 948.) Before this change in regulation, holes excavated by the utilities and their contractors were 12 inches deep after the job was completed, and NY Paving filled them with asphalt the same day. (Tr. 872–873, 988, 1009.) Pursuant to the change in NYCDOT regulations, these holes had to be filled with concrete, which required that the holes be excavated first. (Tr. 872, 948, 1009–1010.) Because the businesses in the industry were generally unprepared for this change, which entailed a dramatic increase in the amount of concrete work, the NYCDOT did not implement the new rules until April 1, 2017. (Tr. 879, 948; see also *New York Paving, Inc.*, JD–33–19 at p. 6.)

The increase in the amount of concrete work required pursuant to the change in NYCDOT regulations engendered an intense, increased demand for additional concrete workers. Miceli testified without contradiction that because the concrete work "exploded" in 2017, NY Paving needed to hire 150 to 200 concrete workers within a single year. (Tr. 915, 948, 1024–1025.) As a result, NY Paving was willing to hire even inexperienced employees to perform concrete work on a trial or "extra" basis, to attempt to learn the work and determine whether they were physically capable of performing it. (Tr. 915–916, 918, 947–949.) These employees were employed by an entity called Di-Jo Construction.[4] (Tr. 914–915; see also *New York Paving, Inc.*, JD–33–19 at p. 4.) The Di-Jo Construction employees accompanying established concrete crews were paid $20 per hour while they observed the regular crews and attempted to learn concrete work. (Tr. 918, 949–950.) Miceli estimated that about ¾ of the Di-Jo Construction employees who tried concrete work quit because they were unable to perform it, but those who "were really good after a month or two" were hired by NY Paving and joined Local 1010, subsequently receiving full contract wages and benefits.[5] (Tr. 917, 950.) Miceli testified that NY Paving continued this practice for about a year and a half, until the end of 2017, and there were no Di-Jo Construction employees performing concrete work in 2018.[6] (Tr. 917, 957.) According to Miceli's unrebutted testimony, on November 2017, all of the remaining Di-Jo Construction employees were put on NY Paving's payroll, joined Local 1010, and were expected to perform as regular concrete crew members, as opposed to on a trial or "extra" basis as they had done previously. (Tr. 964–966.)

The relationship between NY Paving and Local 175 was also affected by changes in ConEd's contractual relationships with its contractors. Hallen had a contract with ConEd which was at least partially subcontracted to NY Paving, effective from approximately 2008 to late 2016 or early 2017. (Tr. 586–587, 889.) In 2014, ConEd amended its Standard Terms and Conditions for Construction Contracts to require that its subcontractors employ only workers represented by local building trades unions affiliated with the Building & Construction Trades Council of Greater New York (NYCBTC). See *New York Paving, Inc.*, JD–33–19 at p. 6–7; see also *Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 at p. 3 (2019); *Tri-Messine Construction Company, Inc.*, 368 NLRB No. 149 at p. 5–6 (2019). Because Local 175 is not a member of the NYCBTC, paving businesses contracting with ConEd were not allowed to use Local 175 members to perform work on ConEd projects. At the time, this change affected other asphalt and concrete paving businesses in the New York City area, including Nico Asphalt Paving, Inc. (Nico) and Tri-Messine Construction Company, Inc. (Tri-Messine), both of which, according to Miceli, stopped using workers represented by Local

02968).) NY Paving also contends in that litigation that the language of Article IV provides for a one-year automatic renewal only. (R. Exh. 20, p. 8, 13.) According to NY Paving's complaint, Local 175 has asserted that the renewal term of the contract is an additional 5 years. (R. Exh. 20, p. 12.)

[4] Employees of Di-Jo Construction also worked in NY Paving's Long Island City yard as mechanics and guards. (Tr. 916–917.)

[5] Miceli testified that he made the determination to hire Di-Jo Construction employees for a regular NY Paving concrete crew based on the recommendations of Sarro and the foremen with whom the Di-Jo Construction employees had worked. (Tr. 951–953, 961–962.) Miceli testified without contradiction that NY Paving did not have a similar process for asphalt workers, because there was no need to hire a large number of new asphalt workers in a short period of time. (Tr. 918.)

[6] Sarro, who distributes paychecks to concrete workers, testified at the hearing that he had not seen paychecks from Di-Jo Construction, which were a different color from NY Paving paychecks, for over a year. (Tr. 806–807, 825.)

175 so that they could continue to work on projects for ConEd.[7] (Tr. 839–840.) However, NY Paving's contract with Hallen at the time did not explicitly prohibit the use of workers represented by unions not affiliated with the NYCBTC, so NY Paving continued to assign asphalt workers represented by Local 175 to perform work pursuant to the Hallen subcontract. (Tr. 890–891.)

Miceli testified that as a result of the situation involving Nico and Tri-Messine, in April and May of 2017, Local 175 began referring members to NY Paving who had never before worked for the company, in lieu of long-standing NY Paving employees. (Tr. 839–840.) Miceli testified that NY Paving could no longer maintain steady, stable crews of asphalt workers as a result. (Tr. 842, 847–848.) In addition, Miceli testified that two of the members referred by Local 175 in late 2016 or early 2017 were not legally authorized to work in the United States. (Tr. 845–846, 945.) Miceli testified that he complained to Local 175's business agent at the time, Roland Bedwell, on several occasions, and Bedwell responded that the members being referred to NY Paving needed to "make their hours." (Tr. 840–841.) Miceli protested that this rationale would make sense at the end of the year, but not at the beginning of the work season. (Tr. 842.) Miceli testified that as a result of Local 175's "cycling" of members through NY Paving, the company decided to create a limited list of Local 175 asphalt workers who were e-verified and issued badges to work at NY Paving. (Tr. 848–853; R. Exh. 19.) This list changes from time to time, as additional members of Local 175 are hired, or members of Local 175 leave their employment with the company. Tr. 854–855. However, only individuals who appear on the list may perform asphalt work for NY Paving.[8] (Tr. 854.)

In 2017, Hallen and ConEd renegotiated their contract. (Tr. 587.) When Hallen subsequently renegotiated its subcontract with NY Paving, effective January 1, 2018, ConEd's Standard Terms and Conditions for Construction Contracts were included. (GC Exh. 19, p. NYP115.) According to Miceli's uncontradicted testimony, the Standard Terms and Conditions for Construction Contracts had never before been incorporated into NY Paving's contract with Hallen. (Tr. 890.) The Standard Terms and Conditions for Construction Contracts included language providing as follows:

> With respect to Work ordered for ConEdison, unless otherwise agreed to by ConEdison, Constractor shall employ on Work at the construction site only union labor from building trades locals (affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the Work to the extent such labor is available.

(GC Exh. 19, p. NYP129.)

On April 28, 2017, Local 1010 filed a petition for a representation election seeking to replace Local 175 as the collective-bargaining representative of NY Paving's asphalt workers. *New York Paving, Inc.*, JD–33–19, at p. 2. The previous day, Local 175 had filed the first of a series of unfair labor practice charges alleging that NY Paving violated Section 8(a)(1) and (2) of the Act by soliciting employees represented by Local 175 to sign authorization cards for Local 1010, and violated Section 8(a)(1) by threatening employees with discharge if they did not sign Local 1010 authorization cards. *New York Paving, Inc.*, JD–33–19, at p. 2. Local 175 also filed charges alleging that NY Paving discharged various employees, refused to recall employees from layoff, refused to hire employees, and caused the discharge of employees, in violation of Section 8(a)(1), (3), and (4). Id. These charges were consolidated for a hearing before Administrative Law Judge Andrew S. Gollin, which took place in September, October, and November 2018. *New York Paving*, JD–33–19, at p. 1–2. On April 5, 2019, Judge Gollin issued a decision finding that NY Paving provided unlawful assistance and support to Local 1010 by urging employees represented by Local 175 to sign authorization cards for Local 1010, in violation of Section 8(a)(1) and (2). *New York Paving, Inc.*, JD–33–19, at p. 32. Judge Gollin also found that NY Paving threatened employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010. Id. However, Judge Gollin recommended that the allegations regarding violations of Section 8(a)(3) and (4) be dismissed. Id. There were no Exceptions filed to Judge Gollin's decision.

On April 28, 2017, Local 175 also filed a grievance with the New York Independent Contractors Alliance alleging that NY Paving had violated its collective-bargaining agreement by assigning bargaining unit work to members of Local 1010. *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 1. On July 2017, Local 1010 threatened NY Paving with various actions, including "picketing and work stoppages," precipitating a charge alleging that Local 1010 violated Section 8(b)(4)(D) and a jurisdictional dispute proceeding pursuant to Section 10(k) of the Act. Id. A hearing was held in Region 29 on September 5 and 6 and October 2 and 10, 2017. Id. On August 24, 2018, the Board issued a Decision and Determination of Dispute, finding that NY Paving

[7] Local 175 filed unfair labor practice charges against Nico and Tri-Messine, complaints were issued by the Regional Director, Region 29, and hearings took place in December 2017 and April 2018, respectively. On November 2 and December 17, 2018, respectively, Administrative Law Judge Jeffrey P. Gardner issued decisions finding that Nico and Tri-Messine had violated Sec. 8(a)(1) and (5) by refusing to bargain with Local 175, and refusing apply their collective-bargaining agreements with Local 175 to their alter ego entities City Wide Paving, Inc. and Callahan Paving Corp, respectively. Judge Gardner further found that Nico and Tri-Messine violated Sec. 8(a)(1) and (2) by recognizing Local 1010 as the collective-bargaining representative of employees of City Wide Paving, Inc. and Callahan Paving Corp., despite the application of Local 175's contracts to their bargaining units. Judge Gardner also found that Tri-Messine violated Sec. 8(a)(1) and (3) by terminating all of its employees on March 3, 2017. Judge Gardner's decisions in both cases were affirmed by the Board. See generally, *Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 (2019); *Tri-Messine Construction Company, Inc.*, 368 NLRB No. 149 (2019).

[8] The badge requirement and policy went into effect in summer 2017, and applies to all workers employed by NY Paving, including members of Local 1010, Local 14–15, Local 282, and other labor unions. (Tr. 852–853.) However, NY Paving only created a list with a limited number of craft workers with respect to Local 175. Miceli's testimony regarding the rationale for and implementation of the badging policy and the Local 175 list was not contradicted by any other testimony or documentary evidence. There is no allegation that the implementation of the badge policy or the Local 175 list violated the Act. See also *New York Paving, Inc.*, JD–33–19 at p. 11.

employees represented by Local 1010 "are entitled to perform sawcutting, excavation, and seed and sod installation, and that employees represented by both Local 1010 and Local 175 are entitled to perform any necessary cleanup relating to the underlying work each local performs." *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 5. Thus, the Board ruled that, "we are awarding sawcutting, excavation, seed and sod installation, and cleanup arising from work performed by Local 1010 to employees represented by Local 1010." Id. The Board further awarded "cleanup arising out of work performed by Local 175 to employees represented by Local 175." Id.

Finally, on May 18, 2018, New York Paving filed an action in the United States District Court for the Eastern District of New York against Local 175 and various benefit funds seeking a declaratory judgment and monetary damages. (R. Exh. 20 (Case 1:18–cv–02968).) This action seeks a judgment to the effect that if NY Paving uses employees represented by Local 1010 to perform asphalt paving work subject to a subcontract involving ConEd, Local 175 and the benefits funds may not file a grievance or arbitration proceeding, and NY Paving will not be obligated to make contributions to the Local 175 benefit funds. (R. Exh. 20, p. 16.) This action was pending at the time of the hearing in the instant case.

C. Work Assignments and Operations at the Long Island City Yard

Louis Sarro and Robert Zaremski are supervisors at NY Paving's Long Island City yard responsible for crews performing concrete and asphalt work, respectively. (Tr. 786.) Sarro and Zaremski set up the crews for each foreman, assigning and removing workers from steady crews. (Tr. 496, 514–515, 786–787, 790, 803–804, 798, 939–940, 955–957.) Sarro and Zaremski determine how many crews go out each day based on work orders, determine what work each crew will perform, and formulate crew routes. (Tr. 492, 498–500, 786–787, 798.) They also process paperwork submitted by the foremen regarding the jobs the crews have performed. (Tr. 503–504, 768–787.) Sarro and Zaremski report to Peter Miceli and Robert Coletti. (Tr. 786.)

Steven Sbarra and Terry Holder are shop stewards for Local 1010 and Local 175, respectively, and are selected for those positions by the unions. (Tr. 796, 932–933.) Sarro and Miceli testified that Sbarra does not have the authority to determine which employees work on a particular crew, nor does Sbarra have the authority to hire, fire, or transfer employees, approve employees for badges, or increase or decrease wages. (Tr. 796, 798–799, 933–934.) Sarro testified that during his 39 years of employment with Respondent, he had never seen Sbarra in any of the company-wide management meetings with Miceli that he attends. (Tr. 799.) Miceli testified that Sbarra and Holder convey information from Sarro and Zaremski to the Local 1010 and Local 175–represented employees.[9] (Tr. 939.) According to Miceli, this practice had evolved as the company's workforce expanded to the point where it was simpler for Sarro and Zaremski to use the shop stewards, who are familiar with the workers in their unions' bargaining units, to locate and communicate with individual employees who perform concrete or asphalt work. (Tr. 939.) Miceli testified that employees would assume that information conveyed to them by Sbarra and Holder had originated with Sarro, Zaremski, or himself. (Tr. 939.)

Individuals who are looking for work are permitted to "shape" in NY Paving's Long Island City yard. (Tr. 788.) These workers come to the yard in the morning in case replacement workers are needed for regular employees who are absent. (Tr. 788.) Sarro and Zaremski have separate offices in the facility. (Tr. 801.) Adjacent to their offices is an office shared by all 30 to 35 foremen, which is also used by Sbarra and Holder. (Tr. 800–801, 938.) The individuals shaping the yard wait on a platform outside the supervisors' and foremen's offices. (Tr. 81, 266, 956.) When Sarro or Zaremski determines that a vacancy exists, he goes outside to the platform and chooses an individual who is shaping to work on the concrete or asphalt crew, respectively. (Tr. 788.) Alternatively, Sarro or Zaremski sends Sbarra or Holder to contact the individual chosen to complete the crew, depending upon whether the crew will be performing concrete or asphalt work. (Tr. 939–940, 954–956, 986–987.) When workers employed by Di-Jo Construction were sent out on crews with NY Paving employees prior to January 2018, Sbarra interacted with the Di-Jo Construction employees in the same manner that he did with the NY Paving employees represented by Local 1010. (Tr. 986–987.)

D. Employment and Discharge of Elijah Jordan

Elijah Jordan testified that he began working with NY Paving in August 2017. (Tr. 51.) Jordan testified that a friend called him and told him that NY Paving was hiring, so Jordan called Sbarra and asked whether there were any open positions. (Tr. 51.) Sbarra suggested that Jordan come to the facility, so Jordan went to the Long Island City yard and met with him. (Tr. 51–52.) Jordan testified that he filled out a W-2 form, and Sbarra told him he would start working the next day. The following day, Jordan went to the yard in the morning and Sbarra showed him the crew that he would be working with. Tr. 52. Jordan testified that he did not see Sbarra consult with anyone else prior to assigning him a crew on his first day of work. (Tr. 53–54.)

Louis Sarro testified that he met with Jordan when Jordan initially came to NY Paving's Long Island City yard. (Tr. 808.) Sarro testified that Jordan came to the yard in approximately fall 2017, and told Sarro that he needed work. (Tr. 808.) Sarro testified that at the time NY Paving gave "a guy off the street looking for a job…an opportunity to prove himself that he could do the job." (Tr. 809–820.) Sarro told Jordan that NY Paving was not really looking for workers and didn't have positions available, but that Jordan could come down in the morning and shape. (Tr. 808.) Sarro told Jordan that if they needed someone in the morning and Jordan was shaping, they could put him to work. (Tr. 808.) Jordan began shaping, and Sarro assigned him to work as it became available. (Tr. 808–809.)

Jordan testified that he was initially assigned to a dig-out

[9] Sarro testified that because his mobility can be limited, he sometimes asks Sbarra to convey information to the concrete workers, or asks Sbarra who is available to replace a missing employee on a concrete crew. (Tr. 797–798.)

crew[10] consisting of six employees, including a foreman named Louie, with whom he worked every day. (Tr. 54.) The crew worked Monday through Friday, and Sbarra would assign Jordan additional work, including dig-outs, sawcut,[11] and concrete base, on weekends. (Tr. 54–55.) After 3 months of work, Jordan asked Sbarra about joining the union, and Sbarra advised him to go to the Local 1010 union hall on October 31, 2017. (Tr. 56.) Jordan joined Local 1010 as of November 1, 2017, and was subsequently paid the rates required pursuant to the Local 1010 collective-bargaining agreement. (Tr. 57–57; GC Exhs. 3, 4.) Jordan was also provided with a NY Paving badge when he joined Local 1010. (Tr. 73–75; GC Exh. 5.) Jordan continued to work steadily during November and December 2017, with the same crew until the weather impeded the performance of concrete work.[12] (Tr. 59–60, 793; R. Exhs. 1, 11, 12.)

Jordan testified that sometime in the spring of 2018, a friend informed him that NY Paving was beginning to call employees back to work, so he began visiting the Long Island City yard. (Tr. 60–61.) Jordan testified that he visited the yard for two or three weeks but there was no work coming in, so he came back 2 months later. (Tr. 61–62.) Jordan testified that at that point he was receiving work assignments via Sbarra, but the work he could perform was limited because he did not have a driver's license. (Tr. 62–63.) As a result, Jordan testified that he would only receive work assignments when no drivers were needed, and when all of the drivers had already been assigned. (Tr. 63.)

Jordan testified that in addition to his work on the Local 1010–represented concrete crews, Sbarra assigned him flagging work on Local 175–represented asphalt crews "all the time" in the spring of 2018. (Tr. 64–65.) Jordan found out about these work assignments because when he arrived at the yard his name would be "on the flagging list." (Tr. 64–65.) Jordan testified that one day when he had not been assigned any work on a Local 1010–represented crew, he spoke to Holder and said that he wanted to become a member of Local 175. (Tr. 76.) Holder confirmed that Jordan approached him, said that he had heard that Holder was the Local 175 shop steward, and stated that he was thinking of switching to Local 175 because although he was a Local 1010 member he was not being assigned a lot of concrete work. (Tr. 266–267.) Holder testified that he provided Jordan with information regarding the person he needed to contact if he was interested in joining Local 175. (Tr. 266–267.) Jordan testified that he also spoke to Sal Franco from Local 175 regarding joining the union, but Franco told him that it "was going to be hard." (Tr. 77–78.) Jordan testified that he subsequently met with Franco three days each week inside the garage in the Long Island City yard, about four blocks from the office. (Tr. 78–79.)

Jordan then began speaking to friends regarding Local 175, and testified that he convinced about ten of them to sign authorization cards for Local 175 in order to remove Local 1010. (Tr. 80–82.) Jordan testified that at the time he began distributing Local 175 cards he was not even shaping the Long Island City yard on a regular basis. (Tr. 207–208.) Jordan himself signed a card on October 10, 2018, and testified that his co-workers would have signed cards after that. (Tr. 206–208; R. Exh. 4.) Jordan testified that he called and met with his co-workers to sign cards for Local 175 down the block from the Long Island City yard, or at a nearby subway station.[13] (Tr. 80–81.)

Jordan testified that in late September or early October 2018, Holder called him and asked whether he was available to work on an asphalt crew. (Tr. 66–67.) Jordan said he was available, and Holder said that he would send him information via text regarding the crew he would go out with the next day and the number of the van they would be using.[14] (Tr. 67.) The next day, October 4, 2018, Jordan worked with the asphalt crew, transporting asphalt with a wheelbarrow. (Tr. 66–67.) Jordan testified that when he went to the office that payday to retrieve his check from Sbarra at 5 a.m., Sbarra stated "I heard you down at 175." (Tr. 68–69.) Jordan said that he was "not identifying with Local 175," that he was still a member of Local 1010. (Tr. 69.) According to Jordan, Sbarra asked whether he had his ID, and Jordan stated that he had not brought his badge. (Tr. 180–181.) Sbarra told Jordan that he was required to have his ID every time he came to the yard. (Tr. 180.) Jordan testified that Sbarra then "basically told me, man, you don't need to be working for us no more," that, "he just basically say I'm a traitor."[15] (Tr. 69–70. Jordan stated that he left immediately, and did not return for two weeks. (Tr. 70.) Jordan testified that when he did return he was assigned "like one or two days of work." (Tr. 70.)

Jordan testified that sometime after October 4, 2018, Holder called him again for work with an asphalt crew. (Tr. 82, 84.) According to Jordan, Holder sent him a list with the van number, as he had done in October. (Tr. 82.) However, Holder later called him and canceled. (Tr. 82–83.) Holder testified that he then saw Jordan working with an asphalt crew that he was also assigned to. (Tr. 267–268.) Holder had initially told Patty Fogarile, who was in charge of milling and paving crews at the time, that the crews were going out short, and suggested that they obtain additional workers from the Di-Jo Construction employees. (Tr. 267–268.) Fogarile told Holder to assign additional Di-Jo Construction employees to the job, and said that he would take care of it. (Tr. 268.) Holder saw Jordan a few days later, and Jordan said that he was not working and wanted to switch to Local 175. (Tr. 268.) He subsequently called and told Holder that

[10] A dig-out is the complete excavation of all material, including asphalt, concrete, and dirt, from a hole or "cut" left by the utility company, so that the hole can then be refilled with concrete or asphalt. Tr. 320–321, 398–399; see also *New York Paving, Inc.*, JD–33–19, at p. 6, fn. 9.

[11] Sawcutting, which precedes a dig-out, consists of cutting up the outer perimeter of the hole left by the utility company in the street or sidewalk, to make the hole evenly shaped prior to the dig-out. (Tr. 399; see also *New York Paving, Inc.*, JD–33–19, at p. 6, fn. 9.)

[12] It is undisputed by the parties that there is generally less work in the colder months because the weather interferes with the various work processes.

[13] Miceli testified that he never observed Jordan distributing literature or engaging in any other sort of activity on behalf of Local 175, and was unaware of Jordan's specific union activities prior to the hearing in this case. (Tr. 924.)

[14] Holder testified that he could not recall speaking to Jordan on October 4, 2018. (Tr. 314.)

[15] Jordan testified that there were a few foremen present during this conversation, but declined to identify them. (Tr. 69.)

he had joined Local 175 and wanted to get on the roster. (Tr. 268.) Holder then told Jordan to come down to the yard and bring his badge. (Tr. 268.) On December 6, 2018, Jordan came to the yard. (Tr. 268, 302–303; R. Exh. 5(c–d).) Holder asked Zaremski to put Jordan on the schedule, but Zaremski said that he would have to clear it with NY Paving's attorney Bob Coletti. (Tr. 268; R. Exh. 5(c–d).) Holder told Zaremski that Jordan already had a badge, but Zaremski said it had to be the right type of badge. (Tr. 268.) Holder told Jordan that he would not be working that day. (Tr. 268.) However, the next day the asphalt crews were short again, so on December 7, 2018, Zaremski authorized Holder to put Jordan on a crew with foreman Billy Smith. (Tr. 268–269.) The next day, however, Jordan told Holder that he had been told that he could not work. (Tr. 269.) When Holder questioned Zaremski, Zaremski said that Jordan could no longer work on asphalt crews.[16] (Tr. 269.)

Jordan testified that he next visited the Long Island City yard on January 7, 2019, after friends called him and told him that they were returning to work on that day. (Tr. 85.) According to Jordan, when he went to the office Sbarra asked whether he was Elijah Jordan, and he said he was. (Tr. 85.) Sbarra asked him to come into the office, where Sbarra was speaking to Louie Sarro. (Tr. 85, 186.) Sbarra told Jordan that he was fired from NY Paving, and that he was "a traitor." (Tr. 85.) Sarro then asked whether Jordan had his ID and told him that he needed to have his ID every time he came to the yard. Tr. 85–86. Sarro testified that he never heard Sbarra call Jordan a "traitor," and had never heard Sbarra ever use the word. Tr. 795.

Sarro testified that he had a conversation with Jordan about his work assignments toward the end of 2018, in his office after the crews had gone out for the day. (Tr. 792–793, 811–812.) Sarro testified that Jordan came into his office and stated that he was going to join Local 175 because he was not being assigned enough work with Local 1010. (Tr. 794.) Sarro told Jordan that if that was what he wanted to do it was fine and wished him good luck. (Tr. 794.) Sarro testified that no one else was present during this conversation. (Tr. 827.)

NY Paving called four witnesses who testified regarding Jordan's work performance on their crews—foremen William Cuff, Michael Whelan, and Joseph Stine, and concrete worker Tomasz Zywiec. (See generally Tr. 705–709, 715–718, 728–731, 746–7451, 755–759, 768, 772–773.) All of these witnesses testified that Jordan's work performance was poor, and created potential safety issues and discontent among the other workers on the crew. Foremen Cuff, Whelan, and Stine testified that they complained to supervisors regarding Jordan, and Stine stated that he told Sbarra that he wanted Jordan removed from his crew. (Tr. 710, 740–741, 755–759, 766, 775.) Sarro and Miceli also testified that several concrete foremen complained about Jordan's work performance, and that he was reassigned from one crew to another as a result. (Tr. 788–790, 921–922.) The testimony of these witnesses is addressed in further detail *infra*.

On April 8, 2019, Jordan sent Sbarra a text message asking whether there was any work for him, and Sbarra replied, "You can come down and stand on the platform like everybody else if there's a spot I put you to work." (Tr. 86–88, 90; GC Exh. 6.) On May 16, 2019, Jordan again sent Sbarra a text message asking whether NY Paving had "open jobs," and Sbarra replied, "You can stand on the platform like everybody else is a lot of guys on that platform." (GC Exh. 6.) These text messages were Jordan's last contacts with NY Paving.

E. Work Allegedly Assigned to Non-Bargaining Unit Employees

1. Flagging work on milling and paving crews

The milling and paving process involves tearing up the asphalt surface of a street and placing new asphalt on the concrete basis. Tr. 983. At NY Paving this work is performed by asphalt workers represented by Local 175. Holder testified that milling and paving work requires two separate crews. The milling crew consists of two workers operating a milling machine, which tears up the street surface, and five workers doing "clean-up" behind the milling machine. (Tr. 223, 227.) Typically, two of the five clean-up workers operate a jackhammer, one sweeps, and the other two workers pick up debris, working with a backhoe. (Tr. 226, 227–228.) After the first crew is finished, a second crew does the paving. (Tr. 223.) The paving crew typically consists of seven workers—one running the paver, two on the back of a spreader, two working as finish rakers, a worker that dumps the trucks, and another worker that does painting and other miscellaneous tasks. (Tr. 226.) "Flaggers," workers who direct traffic around the perimeter of the job site, are sometimes assigned to accompany both the milling and the paving crews. (Tr. 224, 226.) Typically, one to six or seven flaggers are assigned as necessary, depending upon the location and traffic patterns at the job site. (Tr. 224, 226.) Zaremski sets up the milling and paving crews and assigns them work, and the milling and paving foreman is Billy Mortenson. (Tr. 224, 504–505, 516–517.)

Holder and Miceli both testified that traditionally Local 175–represented asphalt employees perform milling and paving work. (Tr. 225, 983.) However, Holder testified that when flaggers were necessary, other employees, particularly Di-Jo Construction employees, were assigned flagging work on milling and paving crews. (Tr. 225, 304.) Zaremski testified that he was not aware of Di-Jo Construction employees doing flagging work on asphalt crews.[17] (Tr. 550–551.) Miceli, however, testified that prior to 2018, Di-Jo Construction and Local 1010–represented workers may have been assigned flagging work on milling and paving crews. (Tr. 983–984.) According to Miceli, NY Paving stopped assigning Di-Jo Construction and Local 1010–represented employees flagging work on milling and paving crews in late 2017 or early 2018. (Tr. 983.)

Jordan testified that he was assigned flagging work on a Local 175–represented asphalt crew but was unclear as to the frequency and dates of such assignments. Jordan testified that he was assigned flagging work on asphalt crews "all the time," when there was no dig-out work on a concrete crew available. (Tr. 64.) Jordan testified that Sbarra communicated these

[16] Zaremski was not questioned regarding this incident.

[17] Sarro testified that he never assigned a Local 1010–represented worker to "perform the placement of asphalt on a sidewalk," but was not asked about assigning Di-Jo Construction or Local 1010–represented employees to perform flagging on asphalt paving crews. (Tr. 834–835.)

flagging assignments to him. (Tr. 64.) Jordan stated that on those occasions Sbarra would send him out "flagging for like a week or two." (Tr. 64.) During his direct testimony, Jordan was vague regarding the months that he was assigned flagging work on an asphalt crew. (Tr. 61–64.) Jordan testified on cross-examination, based on his affidavit, that he was assigned flagging work on asphalt crews beginning in July 2018.[18] (Tr. 128–129.)

2. Emergency keyhole work

Emergency keyhole work is performed by NY Paving pursuant to the subcontract with Hallen discussed previously. Emergency keyhole work involves the repair of holes or "cuts" in streets or sidewalks measuring approximately five feet square, made by ConEd in order to repair the equipment and fixtures beneath. (Tr. 576, 885.) Normally on sidewalks NY Paving normally restores four inches of surface, and on streets 12 inches of surface is replaced. (Tr. 577.) Miceli testified that NY Paving usually waits until two to three days' worth of emergency keyhole work has accumulated, which occurs approximately three to four times per month. (Tr. 583.) At that point, two dig-out crews consisting of Local 1010–represented concrete workers are sent out, with a four-person top crew, which places asphalt to grade on the surface, performing approximately fifteen hours of work behind them. (Tr. 567, 583–584, 613.)

Miceli testified that only a small percentage of the emergency keyhole work involves asphalt. Miceli stated that 80 percent of emergency keyhole work requires the repair of concrete sidewalks, where no asphalt is involved.[19] (Tr. 613, 614, 888.) Miceli further testified that of the 20 percent of the emergency keyhole work performed on streets, 10 of the 12 inches dug out is replaced with concrete, and only the top two inches of the repair consist of asphalt. (Tr. 613, 614–615, 888.) Thus, Miceli estimated that only 10 percent of the emergency keyhole work on the streets involves asphalt work. (Tr. 613, 614–615, 888.)

Miceli admitted during his testimony that from 2008 through a portion of 2017, Local 175–represented employees performed the asphalt component of the emergency keyhole work. (Tr. 568, 587, 1007.) However, Miceli testified that since January 2018, both the concrete and the asphalt portions of the emergency keyhole work have been assigned to NY Paving employees represented by Local 1010.[20] (Tr. 885.)

3. Code 49 work

Code 49 work is performed by NY Paving for National Grid, and consists of placing temporary asphalt in the hole or cut left by National Grid in a street, so that the area can be safely sawcut. (Tr. 509–510, 534–535, 982.) According to Miceli, two to three inches of backfill and temporary asphalt left by National Grid is removed and hot asphalt is placed in the cut so that saws can run over it safely. (Tr. 611, 876, 1008; see also Tr. 535.) After the sawcutting, a dig-out takes place so that the street or sidewalk can be completely repaired in the usual manner, in the case of a street with 10 inches of concrete and two inches of asphalt top. (Tr. 623, 877, 1013–1014.)

Miceli testified that the "Code 49" designation was created in conjunction with National Grid in the summer of 2018, to address a situation where inadequately back-filled holes were resulting in unstable and sinking surfaces. (Tr. 608, 880.) According to Miceli, the large, heavy saws used for sawcutting were becoming stuck or sunk into the backfill left by National Grid, potentially causing significant injury and damage and resulting in corrective action requests and summonses from the City of New York. (Tr. 608–610, 612, 874–875, 879–880.) This was a particular problem after the winter, when the ground thawed, and on Staten Island, where the soil is predominantly sand. (Tr. 608–609, 610–611, 876.) National Grid therefore engaged NY Paving to dig out some of the backfill and put down temporary asphalt so that the saws could be used safely. (Tr. 608.)

Zaremski testified in response to questions from NY Paving's counsel that sawcutting typically takes place two to three days after a Code 49, but had admitted on examination pursuant to Federal Rule of Evidence 611(c) that the temporary asphalt is usually sawcut and dug out 7 to 10 days after a Code 49 takes place. (Tr. 510–511, 535–536.) Miceli testified that the excavation work begins within 5 to 6 calendar days after the Code 49, and is completed within a week. (Tr. 878, 1009.) Zaremski testified that Code 49s are generally performed in the summer, before the weather makes the work more difficult. (Tr. 535.)

Miceli testified that employees represented by Local 1010 had performed all of the Code 49 work since NY Paving and National Grid had created that specific job code in the summer of 2018. (Tr. 880–881.) NY Paving performed some Code 49 work in November and December 2018 and began performing one hundred Code 49s per month at the beginning of 2019. (Tr. 876–877, 880–881.) Miceli testified that all of the Code 49 work was assigned to Local 1010–represented concrete workers because the asphalt paving and the concrete dig-out work constituted "one process," and the dig-out work was awarded to Local 1010 pursuant to the Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*. (Tr. 873–875.)

4. Code 92 work

Code 92 work involves placing temporary asphalt on cuts in the sidewalk excavated by Hallen, to maintain the safety of the sidewalk for pedestrians and ultimately support the saws for sawcutting after the utility is finished with their work. (Tr. 233, 236, 540, 881–882, 980–981.) After the hole is sawcut, the sidewalk is excavated and restored with concrete. (Tr. 882–883.)

Holder testified that Local 175–represented asphalt crews had been assigned Code 92 work, but in early 2019, Zaremski told him that the Code 92 work would be performed solely by employees represented by Local 1010. (Tr. 244, 344, 293–294.) Miceli testified that this change in the assignment of the Code 92 work was engendered by the Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York*

[18] Holder testified that he encountered Jordan when they worked on the same asphalt crew, but it is not clear from Holder's testimony whether Jordan was performing flagging work on that job. (Tr. 267–268.)

[19] Zaremski also testified that there is typically more emergency keyhole work on sidewalks than on roadway. (Tr. 583.)

[20] As discussed above, the emergency keyhole work is the subject of the action initiated by NY Paving in the Eastern District of New York seeking a declaratory judgment. (R. Exh. 20.)

Paving), because, as with the Code 49 work, the placement of temporary asphalt is an integral part of the excavation or dig-out process. (Tr. 873.)

III. DECISION AND ANALYSIS

A. Credibility Resolutions

Evaluating a number of the pertinent fact issues in this case necessarily involves an assessment of witness credibility. Credibility determinations require consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C.Cir. 2003); see also *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility determinations to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In addition, the Board has developed general evidentiary principles for evaluating witness testimony and case presentation. For example, the Board has determined that the testimony of a Respondent's current employees may be considered particularly reliable, in that it is potentially adverse to their own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), *aff'd*, 83 F.3d 419 (5th Cir. 1996). It is also well-settled that an administrative law judge may draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB 336, 336 fn. 1, 349 (2015), enf'd. 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030, fn. 13 (2014).

In making credibility resolutions here, I have considered the witnesses' demeanor, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are discussed and incorporated into my analysis herein.

B. The Discharge of Elijah Jordan on January 7, 2019, and Related Violations (Consolidated Complaint ¶¶ 8, 9, 10–11)

The consolidated complaint alleges that NY Paving violated Section 8(a)(1) and (3) of the Act by discharging Elijah Jordan on January 7, 2019, in retaliation for his support for and activities on behalf of Local 175. The consolidated complaint further alleges that NY Paving violated Section 8(a)(1) when Sbarra interrogated employees regarding their affiliation with Local 175 in November 2018, and threatened employees with discharge in retaliation for their support for and affiliation with Local 175 on January 7, 2019. For the reasons set forth below, I recommend that all of these allegations be dismissed.

1. Witness credibility

General Counsel presented two witnesses who testified regarding the allegations involving Elijah Jordan—Jordan himself and Local 175 shop steward Terry Holder. Holder was a credible and forthright witness. At the time of the hearing, Holder was employed by NY Paving, and his testimony is therefore considered particularly reliable pursuant to Board caselaw. See *Covanta Bristol, Inc.*, 356 NLRB at 253; *Flexsteel Industries*, 316 NLRB at 745. In addition, Holder testified in a straightforward manner, and candidly identified areas where he believed his recollection may have been impaired due to medical treatment he received after the material events in this case. (Tr. 244–245, 251, 273–274.) Holder also had significant experience in the trade and industry and was obviously extremely knowledgeable regarding the work processes involved in asphalt paving and NY Paving's day to day operations in the Long Island City yard. (Tr. 219–220.) The reliability of his testimony in this regard was repeatedly noted by Peter Miceli himself. (Tr. 450, 451, 457–458, 461, 463, 605, 607–608, 612.) Thus, I have generally credited Holder's testimony, except in circumstances where Holder himself stated that his recall of events might be compromised.

Elijah Jordan, on the other hand, was simply not a credible witness. Jordan offered multiple fictitious explanations regarding an issue pertinent to his employment and discharge. Specifically, Jordan initially claimed on both direct and cross-examination that his lack of a driver's license was the sole reason that he was not assigned to a regular concrete crew at NY Paving. (Tr. 62–63, 113–114.) Jordan testified on direct examination, "The only thing that was kind of like messing me up, because I didn't have my driving license…it was stopping me from getting any work because I didn't have my license. If you don't have your license, he can't use you…Most of the crews there they wanted me. I just didn't have my license." (Tr. 62-63.) When asked on cross-examination why he did not have a driver's license, Jordan first testified that, "I lost it, so I'm waiting for a new one to come in the mail." (Tr. 114.) Upon further questioning, Jordan claimed that he did not have a driver's license because he did not have the money to take a driving class. (Tr. 115–116.) Jordan then testified that he did not know how to drive, but minutes later asserted that he did not have a license because he could not afford the $80 fee required to take a driving test. (Tr. 117–118.) When questioned further regarding the issue, Jordan simply got up and left the hearing room. (Tr. 117–119.) After he returned, Jordan admitted that he did not have a license because he had failed the driving test twice. (Tr. 121–122.) Jordan's proffering *three* false rationales for not having a driver's license—the sole reason he gave for NY Paving's failure to assign him to a steady concrete crew—before simply admitting the truth evinces a capacity for untruthfulness which casts doubt on the reliability of his testimony overall.

Furthermore, Jordan's testimony was contradicted in multiple respects by his affidavit taken during the case investigation and by documentary evidence. For example, Jordan initially testified

that NY Paving assigned him work on a steady basis in early 2018 and contended in his affidavit that he worked steadily in March and April of that year. (Tr. 125–126.) However, NY Paving's payroll records establish that Jordan did not work at all from January through March 2018, and that he worked only 3 days in April. (R. Exh. 1.) When confronted with this discrepancy, Jordan admitted that his affidavit was inaccurate. (Tr. 126, 130.) Jordan also claimed that he had already signed an authorization card for Local 175 as of October 4, 2018, when he was assigned a day of asphalt work, when he did not actually do so until October 10, 2018. (Tr. 178–179, 205–206; R. Exh. 4.) In addition, Jordan disavowed a statement in his affidavit that Sbarra approved his going out with an asphalt crew after Holder assigned him asphalt work. (Tr. 131–132.) Although Jordan claimed in his affidavit that Sbarra told him that going out with an asphalt crew was "No problem," in his testimony Jordan said he "would just hop in the truck" on these occasions without Sbarra's explicit approval. (Tr. 131–132.) Indeed, Jordan later testified that, contrary to the assertions in his affidavit, he never told Sbarra he was going out with an asphalt crew at the time. (Tr. 204.) On cross-examination Jordan also contradicted his affidavit and his initial account of the January 7, 2019 meeting culminating in his discharge, claiming for the first time that after he was discharged he asked Sarro, "I'm really getting fired?" and Sarro did not respond. (Tr. 85–86, 146–147.)

Jordan also repeatedly volunteered speculative and non-probative suppositions regarding material events and the motivations of other individuals about which he knew nothing. For example, Jordan theorized that when he asked Sarro whether he was "really getting fired," Sarro's silence constituted an admission that *Sbarra* had made the decision to terminate his employment, or, as Jordan described Sarro's thought process, "this is all on you [Sbarra], you hired him, so you take care of him." (Tr. 185.) Asked about whether Holder called him for work on an asphalt crew after October 4, 2018, Jordan responded, "He called me again, he gave me work, but I guess maybe Steve [Sbarra] probably called it off, say he can't work for you." (Tr. 82.) Jordan stated with respect to Holder's second call, "It's got to be somewhere around October," but later admitted that he could not remember when it occurred. (Tr. 84.) Following a series of patently leading questions on redirect examination, Jordan was asked whether he visited Region 29 after Holder had called him for work on an asphalt crew in December 2018, and responded, "Most likely, I probably went to work. They probably didn't give me no work, and that's when I came here, right after that." (Tr. 182–184.) Jordan's poor memory and propensity for speculation further undermines the overall reliability of his testimony.

Finally, Jordan's demeanor and comportment during his testimony were not characteristic of a witness engaged in a good-faith effort to sincerely participate in the proceedings. When caught in the series of falsehoods regarding the reason for his lacking a driver's license, Jordan stated, "Let me go take a walk real quick,"[21] and stormed out of the hearing room. When I informed Jordan that he was not excused and directed him to return to the witness stand, he responded, "I'm taking a walk outside," and, "I don't believe this."[22] (Tr. 118.) Although he did return to the hearing room, after resuming his testimony Jordan exhibited a flippant and disrespectful manner, repeatedly rolling his eyes, shaking his head, and chuckling in response to the attorneys' questions. Such behavior is simply inconsistent with serious and forthright participation in the hearing process.

For all of the foregoing reasons, I find that Elijah Jordan was not a credible or reliable witness. I find it difficult to credit his testimony even where it is not contradicted by other testimony or documentary evidence.

NY Paving's witnesses Peter Miceli and Louis Sarro also testified regarding issues pertaining to Jordan's employment and discharge. Overall, I find that Miceli was a credible witness, occasionally impassioned but generally forthright. I credit his predominantly uncontradicted testimony regarding the implementation of the badging policy and Local 175 employee list, the hiring of the Di-Jo Construction employees (including Jordan) by NY Paving, NY Paving's day-to-day operations in terms of work and employee crew assignments, and the authority of the supervisors and shop stewards at the Long Island City yard.[23] Sarro's testimony was credible in some respects but patently untrustworthy in others. In particular, Sarro claimed that he had never assigned Local 1010–represented employees to perform asphalt work, despite Miceli's admission that such employees had been assigned to perform emergency keyhole work, Code 49 work, and Code 92 work as discussed in detail *infra*. (Tr. 834–835.) I have therefore generally credited Sarro's testimony only where it constitutes an admission or is corroborated by more reliable evidence, as set forth below.

2. The alleged supervisory and agency status of Steven Sbarra

The consolidated complaint alleges that Local 1010 shop steward Steven Sbarra was a supervisor of NY Paving pursuant to Section 2(11) of the Act. Under Section 2(11), a supervisor is an individual having the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their

[21] Although a question mark appears after this statement in the transcript, it was declarative in nature, and Jordan never asked to take a break or leave the room before getting up and walking toward the exit.

[22] In her posthearing brief at p. 38–39, General Counsel attributes Jordan's departure to Counsel for Respondent's "purposely humiliating questions" and "demeaning tone." Respondent Counsel's questions were appropriately insistent given that Jordan had contended that his lack of a driver's license was the sole issue preventing his assignment to a concrete crew on a steady basis. Counsel's questions were not in my opinion abusive, nor was his tone of voice derogatory.

[23] General Counsel contends that Miceli should be discredited because his testimony that NY Paving had increased the number of Local 175–represented asphalt workers it employs and the number of hours they worked conflicted with documentary evidence submitted by NY Paving after the hearing closed. (Tr. 898–899; R. Exh. 21.) Because the documentary evidence submitted by NY Paving only begins as of July 2018, it is impossible to determine whether the hours worked by Local 175–represented employees increased after the Sec. 10(k) hearing ended in October 2017, as Miceli testified. (Tr. 898; R. Exh. 21.) The documentary evidence submitted by NY Paving shows an overall increase in the hours worked by Local 175–represented employees (omitting the winter months) from July 2018 through May 2019, followed by a precipitous decline in June and July 2019. (R. Exh. 21.)

grievances, or effectively recommend such action." The statue requires that such authority involve "the use of independent judgment" exercised "in the interest of the employer." See, e.g., *Arc of South Norfolk*, 368 NLRB No. 32 at p. 2 (2019), quoting *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The party contending that a specific employee is a statutory supervisor bears the burden of proof on the issue. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Evidence which is "in conflict or otherwise inconclusive" is insufficient to establish supervisory status. *Arc of South Norfolk*, 368 NLRB No. 32 at p. 3, quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Here, the evidence overall is inadequate to establish that Sbarra was a statutory supervisor. I do not credit Sarro's testimony that he, and not Sbarra, initially informed Jordan that he "could come down in the morning, and shape" when Jordan began working with NY Paving in August 2017. (Tr. 788, 808–809.) However, the sole evidence General Counsel introduced to establish that Sbarra did so independently was the testimony of Jordan himself, which was simply insufficient. Jordan testified that the first day he visited NY Paving, Sbarra immediately assigned him to a crew and only told him to return the next day because the crew had already gone out. (Tr. 51–52.) This is inconsistent with the testimony of Miceli, Sarro, Zaremski and Holder to the effect that individuals shaping the yard are only assigned a specific crew the morning the work is to be performed, after the supervisors know which regular crew members will need to be replaced. (Tr. 266, 495–505, 788, 804–806, 975; see also Tr. 169–170, 171–172 (Jordan).) Furthermore, although Jordan testified that Sbarra did not consult with anyone before assigning him to a crew, there is no evidence to establish what, if anything, Sbarra did in that regard between the time that Jordan shaped the yard and the next day when he actually began working.[24] (Tr. 53–54.) Thus, there is no specific evidence involving Jodan to contradict Sarro and Miceli's mutually corroborative testimony that Sbarra merely conveyed Sarro's work assignments to the concrete workers, as opposed to making those crew or work assignments himself. (Tr. 790, 797–798, 933–934, 939.) Given the Jordan's general lack of credibility and the absence of other evidence regarding the inception of his employment, I find that Miceli, Sarro, and Holder's testimony was more reliable than Jordan's with respect to these issues. Therefore, the record overall does not support General Counsel's contention that Sbarra exercised independent judgment in connection with Jordan's initial shaping and crew assignment.

General Counsel also argues that Sbarra is a statutory supervisor because he "ultimately determined that Jordan would become a member of Local 1010 and be hired by NY Paving directly." GC posthhearing brief at 29, 48. However, this contention is based solely on Jordan's account of his own conversation with Sbarra, and there is no evidence in the record to establish that Sbarra made these decisions, let alone made them independently. (Tr. 56–57.) Furthermore, Jordan testified only that he asked Sbarra about joining Local 1010, and Sbarra advised him to go to Local 1010's offices on October 31, 2017. Id. Thus, while the evidence establishes that Jordan was paid by NY Paving at the Local 1010 contract rates thereafter, Jordan did not even testify that Sbarra mentioned his being hired directly by NY Paving during this conversation. (Tr. 56–60; GC Exhs. 3, 4.) In addition, I credit Miceli's testimony that he made the determination that NY Paving hire all of the Di-Jo Construction employees as of November 1, 2017, because Di-Jo Construction "became such a big issue" in legal proceedings.[25] (Tr. 916–918.) With respect to Jordan's joining Local 1010, Sbarra was that union's shop steward, and would have advised Jordan to visit the union hall in that capacity, as NY Paving points out. R. posthearing brief at 26. As a result, the evidence does not demonstrate that Sbarra acted with independent judgment on NY Paving's behalf in connection with Jordan's being hired by NY Paving or joining Local 1010. In fact, there is no evidence evidence establishing that Sbarra had anything whatsoever to do with Jordan's being hired by NY Paving.

Finally, I find that the evidence overall does not establish that Sbarra "had in fact fired other workers" for sleeping on the job, as General Counsel contends. (GC posthearing brief at 31, 48; Tr. 70–72.) Jordan testified in this regard that he once saw and heard Sbarro tell someone on the platform that he was fired and was no longer allowed on the property. (Tr. 70–72.) A picture of this person sleeping in a work van was posted on the wall in front of Sarro's office, near OSHA notices posted by Sarro. (Tr. 71, 166–167.) Jordan stated that he never saw that particular individual at NY Paving again. (Tr. 72.) However, Jordan admitted on cross-examination that he did not know who posted the picture of the employee sleeping in front of Sarro's office. (Tr. 167.) And there is no other evidence in the record regarding the identity of this employee, who made any actual decision to discharge him, when the incident occurred, or the specific circumstances involved. As a result, I do not find that this evidence effectively rebuts Miceli and Sarro's testimony that Sbarra did not have the authority to discharge employees, and that Sbarra only conveyed information to concrete workers regarding decisions made by Miceli and Sarro themselves.

For all of the foregoing reasons, I find that General Counsel has failed to satisfy the burden to establish that Sbarra was a supervisor within the meaning of Section 2(11) of the Act during the events material to the consolidated complaint's allegations.

The consolidated complaint also alleges that Sbarra was an agent of NY Paving pursuant to Section 2(13) of the Act. It is well-settled that the Board applies common-law agency principles in order to determine whether an employee is acting with apparent authority on behalf of the employer when making a specific statement or taking a particular action. See, e.g., *Pan-Oston*

[24] As discussed previously, Sbarra was not called as a witness and did not testify at the hearing. However, General Counsel does not request that I draw an adverse inference on this basis.

[25] General Counsel contends that Miceli's testimony in this regard is incredible because the hearing in the case before Judge Gollin did not begin until the fall of 2018, months after the Di-Jo Construction employees were hired by NY Paving. (GC posthearing brief at p. 40–41; Tr. 917.) However, later in his testimony Miceli clarified that he was referring to the Sec. 10(k) hearing in *Highway Road & Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174, which took place in September and October 2017. (Tr. 914–915; see also Tr. 569.) Miceli testified at the Sec. 10(k) hearing and appeared as a corporate representative. (Tr. 870.)

Co., 336 NLRB 305, 305–306 (2001). In particular, the Board considers whether "under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Pan-Oston Co.*, 336 NLRB at 306; see also *D&F Industries*, 339 NLRB 618, 619 (2003). In many cases, the Board has evaluated the purported agent's role in acting as a "conduit of information" between management and the employees, so that the employees would conclude that the alleged agent was speaking on management's behalf. See, e.g., *Victor's Café 52*, 321 NLB 504, fn. 1 (1996) (agent was "the usual conduit for communicating management's views and directives to employees, from the time of their hiring through their daily accomplishment of their tasks"); *Southern Bag Corp.*, 315 NLRB 725 (1994) (agent was "an authoritative communicator of information on behalf of management"); *B-P Custom Building Products*, 251 NLB 1337, 1338 (1980) (agent "relayed information from management to employees and had been placed by management in a strategic position where employees could reasonably believe he spoke on its behalf"). The burden to establish agency status rests upon the party asserting it. *Pan-Oston Co.*, 336 NLRB at 306.

The evidence here establishes that Sbarra was an agent of NY Paving, in that Sbarra served as a conduit for information between NY Paving management and the Local 1010–represented employees on a daily basis and in a manner which would cause those employees to reasonably believe that Sbarra was speaking for management. For example, Sarro testified that he asks Sbarra to convey information, including his decisions regarding work assignments, to the concrete workers, and asks Sbarra which concrete workers are shaping and available to replace a missing employee on a crew. (Tr. 797–798.) I do not credit Sarro's assertion that this happens only occasionally, given Miceli's testimony that using the shop stewards to convey information regarding crew assignments became necessary as NY Paving's workforce increased, so that it was "simpler to go through" Sbarra and Holder, because "as a shop steward, they know every single guy that's in the Union, they know every guy that's in the crew." (Tr. 797, 939.) Miceli also testified that Sbarra relayed information from Sarro to the concrete employees represented by Local 1010. (Tr. 939.) In fact, Miceli testified on direct examination that when Sbarra relays a message to the concrete workers, "I'm sure they think it's coming from me" or Sarro. (Tr. 939.) Thus, the evidence establishes that Jordan would reasonably view Sbarra as speaking and acting on behalf of management, and that Sbarra therefore acted as an agent of NY Paving during their interactions regarding Jordan's employment. See *D&F Industries*, 339 NLRB 618, 619–620 (2003) (managerial assistants were agents of the employer where they conveyed information and decisions regarding production, work rules, work to be performed on each shift, and employee assignments to employees). As a result, the evidence establishes that Sbarra was an agent of NY Paving pursuant to Section 2(13) of the Act with respect to his statements regarding Jordan's employment.

3. Violations of Section 8(a)(1) allegedly committed by Steven Sbarra

The consolidated complaint alleges that NY Paving, by Sbarra, committed two violations of Section 8(a)(1). The consolidated complaint alleges that Sbarra unlawfully interrogated employees regarding their affiliation with Local 175 "In or about November 2018."[26] The consolidated complaint further alleges that Sbarra threatened employees with discharge in retaliation for their affiliation with Local 175 on January 7, 2019. The only evidence General Counsel adduced at the hearing in support of these allegations was testimony of Elijah Jordan, which is simply inadequate to substantiate them.

The Board considers the totality of the circumstances involved in order to determine whether interrogating an employee regarding their union sympathies or activities is unlawful. See, e.g., *Manor Care Health Services-Easton*, 356 NLRB 202, 218 (2010), enf'd. 661 F.3d 1139 (D.C. Cir. 2011); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), enf'd. 531 F.3d 321 (4th Cir. 2008). The factors typically evaluated include the location involved, the manner and method of the questioning, the nature of the information solicited, the relative status of the participants in the employer's hierarchy, and the truthfulness of the employee's responses. See *Evergreen America Corp.*, 348 NLRB at 208–209; *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Any history of employer hostility or discrimination is also considered, as is whether the employee involved openly supports the union. *Evergreen America Corp.*, 348 NLRB at 208; *Westwood Health Care Center*, 330 NLRB at 939. The ultimate purpose of the analysis is to determine whether "under all the circumstances the questioning at issue would reasonably tend to coerce the employee…so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Manor Care Health Services-Easton*, 356 NLRB at 218, quoting *Westwood Health Care Center*, 330 NLRB at 940.

Steven Sbarra was not called by NY Paving and did not testify at the hearing. However, I find that Jordan's testimony with respect to the conversation during which Sbarra allegedly interrogated him was so disjointed and ambiguous that it is insufficient to establish what actually occurred. On direct examination, Jordan initially described his interaction with Sbarra as follows: "I went to go pick up my check and [Sbarra] basically told me I didn't give you that work for you to work with them. So it was basic like I was a traitor to him." (Tr. 68.) Asked about the conversation in further detail, Jordan testified that he began it by telling Sbarra that he was at the facility, "to pick up my check." (Tr. 68.) Minutes later, however, Jordan testified that he did not say anything to Sbarra when he arrived, but that Sbarra opened the conversation by saying, "I heard you down at 175." (Tr. 69.) According to Jordan, when he told Sbarra he was not a member of Local 175 but was still a member of Local 1010, Sbarra, "basically told me, man, you don't need to be working for us no more." (Tr. 69.) Jordan then amended that to testify that after he told Sbarra he was still a Local 1010 member, Sbarra, "just

[26] In her posthearing brief at p. 35–36 and 50–51, General Counsel argues that this incident occurred on October 10, 2018, but there is no to establish that it took place on that particular date. NY Paving's payroll records indicate that a paycheck for work performed the week ending October 7, 2018, was dated October 10, 2018, but there is no evidence demonstrating that Jordan actually retrieved that paycheck on that date. See, e.g., Tr. 67–68.

basically say I'm a traitor, so after that I just left." (Tr. 70.)

This testimony simply does not provide a sufficiently coherent or definite description of the conversation containing Sbarra's allegedly unlawful interrogation to formulate a meaningful determination as to whether Sbarra's remarks violated the Act. Of course, Jordan's repeated modifications of his account of this relatively brief conversation—occurring within the span of minutes during his testimony—cast doubt on its ultimate accuracy. In addition, Jordan's repeated use of the words "basic" and "basically" to describe Sbarra's remarks makes it impossible to determine whether Jordan was summarizing or characterizing Sbarra's statements, as opposed to relating Sbarra's exact words to the best of his recollection. See *Benjamin Coal Co.*, 294 NLRB 572, 592, 593, 594 (1989) (declining to find 8(a)(1) violations based upon testimony which failed to establish exact words of the allegedly unlawful statement). As a result, even though Jordan's testimony on this point is unrebutted, I simply cannot find that Jordan's account of his conversation with Sbarra adequately describes Sbarra's statements for the purpose of determining whether they constituted an unlawful interrogation. I therefore find that the evidence does not establish that NY Paving violated Section 8(a)(1) by interrogating employees regarding their affiliation with Local 175 in or around November 2018 and will recommend that this allegation be dismissed.

General Counsel also contends that NY Paving violated Section 8(a)(1) by threatening Jordan with discharge on January 7, 2019, when Sbarra called him a "traitor." GC posthearing brief at p. 51, citing *Jennie-O Foods*, 301 NLRB 305, 333 (1991). However, the evidence regarding Jordan's interaction with Sbarra on January 7, 2019, is similarly contradictory and uncertain. Jordan first claimed on direct examination that on January 17, 2019, Sbarra initially asked whether he was Elijah Jordan, and told him to come into the office, where Sarro was also present. (Tr. 85.) Jordan testified that when he came into office, Sbarra told him that he was "fired from this company," and called him a "traitor," after which Jordan left and went home. (Tr. 85.) However, Jordan then testified that after Sbarra said he was fired and called him a traitor, Sarro asked whether he had his company identification, and told him to make sure that he had his identification with him every time he came to the Long Island City yard. (Tr. 85–86.) Jordan's contention that Sarro reminded him to carry a NY Paving identification badge while on company property immediately after he was discharged makes no sense. In addition, when questioned by Counsel for Local 175, Jordan testified that Sbarra did not say anything to him before telling him that he was fired, and did not mention anything about Jordan's affiliation with Local 175. (Tr. 105.) Then on cross-examination Jordan asserted for the first time that after Sbarra fired him and called him a "traitor" on January 7, 2019, he asked Sarro, "I'm really getting fired?" and Sarro did not respond. (Tr. 146.) As discussed previously, this particular assertion contravened both his direct testimony and his affidavit. Given these contradictions and the general unreliability of Jordan's testimony as discussed above, I find that the evidence does not establish that Sbarra called Jordan a "traitor" before his discharge on January 7, 2019. For the foregoing reasons, I find that General Counsel has not established that NY Paving violated Section 8(a)(1) by threatening employees with discharge on January 7, 2019, in retaliation for their affiliation with Local 175 and will recommend that this allegation be dismissed as well.

4. The discharge of Elijah Jordan

The Board evaluates allegations of unlawful discharge involving employer motivation using the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983). Pursuant to *Wright Line*, General Counsel must establish that an employee's union or protected activity was a motivating factor in the discharge. *Adams & Associates, Inc.*, 363 NLRB 1923, 1929 (2016), enf'd. 871 F.3d 358 (5th Cir. 2017). In order to do so, General Counsel must adduce evidence to demonstrate that the employee in question engaged in union or protected concerted activity, the employer's knowledge of that activity, and anti-union animus on the employer's part. *Adams & Associates, Inc.*, 363 NLRB 1923, 1929; *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enf'd. 801 F.3d 767 (7th Cir. 2015). If General Counsel substantiates these elements of a *prima facie* case, the burden then shifts to the employer to show that it would have taken the same action in the absence of the employee's protected conduct. *Adams & Associates, Inc.*, 363 NLRB 1923, 1929, citing *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enf'd. 127 F.3d 34 (5th Cir. 1997). In order to do so, the employer cannot simply present a legitimate reason for the adverse action but must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's protected activity. *North West Rural Electric Cooperative*, 366 NLRB No. 132, at p. 18 (2018); *Durham School Services*, 360 NLRB 694, 701 (2014).

General Counsel has established the first two elements of a *prima facie* case—protected concerted activity and employer knowledge. The record establishes that Elijah Jordan engaged in protected activity on behalf of Local 175 during his employment at NY Paving. Jordan testified without contradiction that some time in the fall of 2018, he approached Holder and Franco, and discussed joining and organizing on behalf of Local 175. I credit Jordan's testimony that he subsequently signed a Local 175 authorization card on October 10, 2018, and distributed Local 175 authorization cards to other NY Paving employees. The record therefore establishes that Jordan engaged in protected activity on behalf of Local 175.

The evidence further establishes that NY Paving had knowledge of Jordan's affiliation with Local 175. The evidence does not demonstrate that NY Paving's management was aware of Jordan's specific activities on behalf of Local 175. However, Sarro testified that in late 2018, Jordan came to his office and stated that he intended to join Local 175 because he was not being assigned enough concrete work. Sarro testified that he told Jordan that if he wanted to join Local 175 that was fine, and wished him good luck. Thus, the evidence establishes that NY Paving was aware that Jordan was seeking to join Local 175 prior to his discharge on January 7, 2019. NY Paving argues that although Jordan told Sarro that he intended to join Local 175, management did not know whether Jordan had actually done so at the time of his discharge. R. Posthearing Brief at p. 37–38. However, the distinction NY Paving attempts to draw in this regard is not legally significant. See *K.W. Electric, Inc.*, 342

NLRB 1231 (2004) (alleged discriminatee's statement to owner that he "intended to join the Union" evidence of employer knowledge of protected union activity). As a result, I find that the evidence establishes that NY Paving was aware of Jordan's support for Local 175 as of January 7, 2019.[27]

I also find that the record establishes some evidence of animus against Local 175. Factors which may support a finding of anti-union animus include other unfair labor practices committed contemporaneously with the discharge, the timing of the discharge in relation to union activity, the employer's reliance on pretextual reasons to justify the discharge, disparate treatment of employees based on union affiliation, and the employer's deviation from past practice. See, e.g., *Roemer Industries*, 367 NLRB No. 133, at p. 15 (2019), citing *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985). General Counsel need not show specific animus toward the alleged discriminatee in order to establish a *prima facie* case. *EF International Language Schools, Inc.*, 363 NLRB 199, 199 fn. 2 (2015), enf'd. 673 Fed.Appx. 1 (D.C. Cir. 2017). As discussed *infra*, I have found that NY Paving violated Section 8(a)(1) and (5) of the Act by unilaterally transferring emergency keyhole work, Code 49 work, and Code 92 work covered by its collective-bargaining agreement with Local 175 to non-bargaining unit employees.[28] The evidence further establishes that the unlawful unilateral transfer of work was ongoing at a time reasonably proximate to Jordan's discharge. This violation constitutes some evidence of animus against Local 175. See, e.g., *Roemer Industries*, 367 NLRB No. 133, at p. 16 (contemporaneous unlawful unilateral change evidence of animus); *Galicks*, 354 NLRB 295, 298 (2009), affirmed 355 NLRB 366 (2010), enf'd. 671 F.3d 602 (6th Cir. 2012) (same).

General Counsel argues that animus against Local 175 can also be established by the violations found by Judge Gollin in *New York Paving, Inc.*, JD–33–19. As discussed above, in that case Judge Gollin found that NY Paving provided unlawful assistance and support to Local 1010 when Anthony Bartone, Jr. urged employees represented by Local 175 to sign authorization cards for Local 1010, in violation of Section 8(a)(1) and (2), in mid to late-April 2017. *New York Paving, Inc.*, JD–33–19, at p. 23, 32. Judge Gollin also found that on April 27, 2017, Paddy Labate threatened employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010, in violation of Section 8(a)(1).[29] *New York Paving, Inc.*, JD–33–19, at p. 22, 24, 32. However, the violations found by Judge Gollin are extremely attenuated to support a finding of animus with respect to Jordan's discharge. *New York Paving, Inc.*, JD–33–19, at p. 7–10. Where the Board has based a finding of animus on violations occurring more than one year prior to the allegedly unlawful conduct in a subsequent case, the earlier violations have involved the same type of unlawful conduct, and/or the same employer representatives or discriminatee. See *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 159, at p. 1, fn. 1 (2017), enf'd. 783 Fed.Appx. 1 (D.C. Cir. 2019); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 (2017); *Midwest Terminals of Toledo International, Inc.*, 362 NLRB 468 (2015), affirmed 365 NLRB No. 157 (2017), enf'd. 783 Fed.Appx. 1 (D.C. Cir. 2019); see also *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007). It is true that the conflict amongst NY Paving, Local 175, and Local 1010 ultimately engendered by the NYSDOT's change in regulations and ConEd's enforcement of its subcontracting language was ongoing through the time of Jordan's discharge. In addition, Jordan's allegedly unlawful discharge here is a violation of the same type as the threat of discharge found by Judge Gollin, involving the interference with employees' Section 7 rights. See *St. George Warehouse, Inc.*, 349 NLRB at 878. However, the discharge occurred on January 7, 2019, 18 months after the unlawful assistance and threat of discharge in the previous case, which took place in April and March 2017, respectively. Furthermore, neither Bartone nor Labate, the supervisor and agent who committed the violations found by Judge Gollin, were involved in any way in Jordan's employment or discharge. As a result, the violations of Section 8(a)(1) and (2) found by Judge Gollin provide only minimal support for a finding of animus in the instant case.

General Counsel further argues that animus against Local 175 should be inferred based upon NY Paving's decision to limit the number of badges issued to workers represented by Local 175. GC posthearing brief at p. 54. The identical contention was raised by General Counsel and Local 175 in the previous case against NY Paving, and was explicitly rejected by Judge Gollin. *New York Paving, Inc.*, JD–33–19, at p. 11, 27. As Judge Gollin noted in his decision, although Local 175 filed charges against NY Paving alleging that the implementation of the badging policy violated the Act, the consolidated complaint in that case did not contain such an allegation. *New York Paving, Inc.*, JD–33–19, at p. 27, fn. 36. Nor does the consolidated complaint in the instant case. In any event, here, as in the case before Judge Gollin, Miceli testified that the number of badges issued to Local 175–represented asphalt workers was limited to a specific list of individual members because Local 175 began "cycling" members through NY Paving who had never before worked for the company, including two individuals who were not legally authorized to work in the United States. (Tr. 839–841, 845–846, 848–849, 990–992.) General Counsel and Local 175 introduced no evidence whatsoever to contradict Miceli's contentions in this regard. Thus, here, as in the case before Judge Gollin, the evidence establishes that the list of union-represented employees was limited solely to Local 175 because none of the other unions were "cycling" random members through NY Paving.[30] (Tr.

[27] General Counsel does not argue that Jordan's performance of asphalt work allegedly covered by the Local 175 collective-bargaining agreement in October 2018 constitutes protected activity or establishes NY Paving's knowledge of Jordan's affiliation with Local 175. GC posthearing brief at 53–54.

[28] I find no merit in General Counsel's argument that NY Paving's assignment of work to Local 1010 which the Board had awarded to that union in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)* constitutes evidence of animus against Local 175. GC posthearing brief at p. 54–55.

[29] Judge Gollin found that Labate, a working foreman at that time, acted as an agent of NY Paving pursuant to Sec. 2(13) of the Act. *New York Paving, Inc.* JD–33–19, at p. 22.

[30] I also note that NY Paving introduced evidence that it had increased the number of badged employees on the Local 175 list as necessary. (Tr. 558–559, 1020–1021, 605–607.)

985–986; see *New York Paving, Inc.*, JD–33–19, at p. 11, 27.) Therefore, in the absence of any countervailing evidence I find, as did Judge Gollin, that the limitation on the number of badges issued to Local 175–represented employees was implemented for the business reasons described by Miceli in his testimony, and was not motivated by animus against Local 175.

For the foregoing reasons, although the evidence of animus is relatively meager, I find that General Counsel has established a *prima facie* case that Jordan's support for Local 175 was a motivating factor in his discharge on January 7, 2019.

A *prima facie* case having been established, the burden then shifts to NY Paving to present evidence establishing that it would have discharged Jordan in the absence of his protected conduct. As discussed above, in order to satisfy this standard NY Paving must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of Jordan's protected activity. I find based on the record here that NY Paving has met its burden to do so.

In particular, I find that NY Paving has fully substantiated its contention that Jordan was discharged because he was simply incapable of adequately performing concrete or asphalt paving work. I credit the testimony of NY Paving's concrete foremen William Cuff, Michael Whelan, and Joseph Stine, and of employee Tomasz Zywiec, regarding Jordan's poor work performance on their concrete crews. Jordan confirmed that he was unable to cut or float concrete, and given the testimony of NY Paving's witness I find Jordan's testimony that he was capable of brooming concrete to be patently incredible. (See Tr. 112 (Jordan), 707–708 (Cuff), 729 (Whelan), 748–749 (Zwiec), 757 (Stine).) In addition, Cuff, Whelan, Zywiec, and Stine testified that Jordan was physically incapable of operating a jackhammer. (Tr. 707, 718–719, 729, 749, 756–757.) Whelan actually testified that he did not allow Jordan to use a jackhammer while Jordan was on his crew because he was concerned that Jordan would "hurt himself" if he did so. (Tr. 729.) I credit their consistent testimony in this regard over Jordan's contention that he was "good with a jackhammer," and that Cuff wanted him on his crew as a result. (Tr. 112–114.) I further credit the foremen's consistent assertions that Jordan lacked motivation to learn the work, failed to follow directions, and was insufficiently attentive. (See Tr. 705–706, 715, 718 (Cuff), 728–730 (Whelan), 755–756, 772–773 (Stine).) These witnesses further noted a lackadaisical and offhand manner on Jordan's part, despite the arduous and potentially dangerous nature of the work they perform, which was consistent with Jordan's demeanor during the hearing as discussed above. (Tr. 706, 716 (Cuff), 728 (Whelan), 757–759, 768, 773 (Stine).) Cuff, for example, testified that Jordan came to work with his boots untied and without a belt, creating a potential safety risk for the crew. (Tr. 706, 716.) Stine testified that Jordan laughed when he was unable to remove a jackhammer from the compressor and did not take the work seriously. (Tr. 757, 758–759, 768, 773.) Their testimony that Jordan was primarily relegated to lower-skilled flagging and sweeping work as a result was confirmed by the testimony of Holder and Jordan himself. (Tr. 64–65, 110–111, 129–130, 136–137 (Jordan), 307–308 (Holder), 708 (Cuff), 750 (Zywiec), 755–756 (Stine).) I further find it plausible that crew members need to be able to perform a variety of tasks in order to share the crew's physically demanding work in an equitable manner, and that one worker's inability to do so would cause resentment and hostility on a crew of two to six people, as NY Paving's witnesses contended. (See Tr. 708–709 (Cuff), 730–731 (Whelan), 746–747, 748–749, 750–751 (Zywiec), 757–758 (Stine); see also Tr. 790–791 (Sarro), 925–926 (Miceli).)

Given the problems with Jordan's work performance, and the possible safety concerns, I find it the foremen's testimony that they complained about Jordan to supervisors to be credible. (Tr. 710 (Cuff), 740–741 (Whelan), 755 (Stine).) Stine in particular testified without contradiction that he told Sbarra that he wanted to have Jordan removed from his crew after one week based in part on complaints from the rest of the crew regarding Jordan's poor performance and the unequal division of work which ensued. (Tr. 755, 758–759, 766, 775.) I therefore credit Sarro's testimony that several of the concrete foremen complained about Jordan and requested that he not be assigned to their crews in the future. (Tr. 788–789, 921–922.) I further credit Sarro and Miceli's testimony that they moved Jordan from crew to crew in order to ensure that one or more of the foremen's complaints were not engendered by personality differences, but eventually concluded that Jordan's work performance was simply inadequate. (Tr. 790, 921–922.) I further note in this respect that the collective-bargaining agreement between Local 175 and NY Paving provides that NY Paving "shall at all times be the sole judge as to the work to be performed and whether such work performed by an [e]mployee is or is not satisfactory." (ALJ Exh. 1, p. 5; see also *New York Paving, Inc.*, JD–33–19 at p. 5, fn. 8.)

General Counsel contends that NY Paving effectively condoned Jordan's poor work performance by continuing to assign him work from May 2018 through the fall of that year—until he informed Sarro that he intended to join Local 175. GC posthearing brief at p. 55–56. The Board has long held that a discharge based on misconduct condoned by an employer until after the employee in question engages in protected activity indicates that the discharge would not have occurred otherwise. See, e.g., *Deep Distributors of Greater New York*, 365 NLRB No. 95, at p. 2–3, 17 (2017), enf'd. 740 Fed.Appx. 216 (2d Cir. 2018); *Waterbury Hotel Management, LLC*, 333 NLRB 482, 526–527 (2001), enf'd. 314 F.3d 645 (D.C. Cir. 2003). Here, Sarro testified that he began receiving complaints from the foremen about Jordan's work performance from the inception of his employment, which began in August 2017. (Tr. 813.)

However, the evidence overall simply does not establish that Jordan's poor work performance was condoned until NY Paving became aware of his affiliation with Local 175. For example, General Counsel argues that NY Paving condoned Jordan's work performance issues by hiring him onto the NY Paving payroll as of November 1, 2017, after Jordan worked for Di-Jo Construction for approximately 3 months. GC posthearing brief at 31–32. However, there is nothing in the record to contradict Miceli's credible assertion that *all* of the Di-Jo Construction employees were hired by NY Paving at that time after the Di-Jo Construction employees "became such a big issue" in legal proceedings. (Tr. 916–918.) Furthermore, NY Paving's payroll records establish that after an initial period of employment in November and December 2017, Jordan was not assigned work again until early May 2018, even though according to Jordan's own testimony

other employees returned to work earlier in the spring. (Tr. 60–61; R. Exh. 1.) After three days of work in early May, Jordan was not assigned work again until early June. (R. Exh. 1.) Jordan was assigned work more steadily through the end of July, but then was assigned nothing until early September 2018. (R. Exh. 1.)

This is not a work history which substantiates the contention that Jordan's poor work performance was somehow condoned by NY Paving. Instead, the documentary evidence is more consistent with Sarro's testimony that he assigned Jordan work when "we're shorthanded and we need to send somebody out just to fill the crew up," when a crew is in "a certain location" where an extra person is necessary "to be a flagman or to do something for the day that they're going to need the body there, and we put him there since there's no one else available." (Tr. 813–814.) In addition, NY Paving's payroll records establish, and Jordan admitted in his testimony, that the work he was assigned had substantially diminished even before he began his activities on behalf of Local 175 in October 2018, let alone prior to telling Sarro that he intended to join Local 175. (Tr. 136; R. Exh. 1.) Specifically, Jordan admitted that the work he was assigned by NY Paving had "basically dried up" as of October 10, 2018, when he signed a Local 175 authorization card. (Tr. 136.) Indeed, Jordan admitted that he had "basically stopped shaping up" at NY Paving before he was even given Local 175 authorization cards. (Tr. 207–208.) Such a sequence of events is not only inadequate to establish condonation, but undermines an assertion of retaliatory motivation in and of itself.

Finally, General Counsel contends that NY Paving departed from its typical employment practices because Sbarra explicitly told Jordan that he was fired. GC posthearing brief at 55. The evidence does establish, as General Counsel argues, that NY Paving typically does not discharge or discipline employees but instead sends them, as Miceli testified, "back to the union." (Tr. 926–927.) Miceli also testified that he decided that Jordan should "go back to the union, get a steady job someplace" because "[t]here's not steady work here for him." (Tr. 923–924.) In addition, as discussed above, Sbarra did not testify at the hearing, so that Jordan's testimony regarding their interaction on January 7, 2019 is unrebutted. NY Paving argues that Sarro testified that the January 7, 2019 conversation between Sbarra and Jordan never took place. (R. posthearing brief at 62–63, citing Tr. 792–795.) However, in his testimony, Sarro merely stated that he never heard Sbarra call Jordan a "traitor." (Tr. 795–796.) He was not asked by counsel regarding whether he was present at a meeting where Jordan was discharged and did not testify that he never heard Sbarra tell Jordan that he was fired. Thus, Jordan's testimony that Sbarra told him that he was fired was not rebutted by Sarro either. As a result, I find that the weight of the evidence overall establishes that Sbarra told Jordan that he was fired on January 7, 2019. Furthermore, for the reasons set forth above, the evidence establishes that Sbarra was an agent of NY Paving pursuant to Section 2(13) of the Act.

The evidence therefore establishes that NY Paving diverged from its typical practice when Sbarra told Jordan that he was discharged. However, given the evidence introduced by NY Paving which fully substantiates its contentions regarding Jordan's poor work performance, and the evidence contradicting a condonation argument and retaliatory motive, I find that NY Paving has satisfied its burden to show that it would have taken the same action with respect to Jordan in the absence of his protected activities. As a result, I will recommend dismissal of the consolidated complaint's allegation that NY Paving violated Section 8(a)(1) and (3) of the Act by discharging Jordan in retaliation for his affiliation with or support for Local 175.

C. The Alleged Unlawful Transfer of Asphalt Paving Work (Consolidated Complaint ¶ 13)

The consolidated complaint alleges that NY Paving violated Section 8(a)(1) and (5) of the Act by transferring asphalt paving work covered by its collective-bargaining agreement with Local 175 to non-bargaining unit employees without providing Local 175 with an opportunity to bargain and without negotiating to impasse. General Counsel argues that NY Paving unlawfully transferred four distinct categories of work purportedly covered by the Local 175 contract—flagging work on milling and paving crews, the asphalt paving component of emergency keyhole wok, Code 49 work, and Code 92 work. As a general matter, NY Paving does not dispute that it assigned all of the emergency keyhole work, Code 49 work, and Code 92 work to employees outside the Local 175 bargaining unit.[31] However, NY Paving contends that the assignment of this work to Local 1010–represented employees was legally permissible for various reasons.

As discussed below, the evidence is insufficient to establish that flagging work on milling and paving crews was assigned to employees outside of the Local 175 bargaining unit within the six-month period prior to Local 175's filing the unfair labor practice charge in Case No. 29–CA–234894. However, the evidence demonstrates that the asphalt component of emergency keyhole work, Code 49 work, and Code 92 work were unlawfully transferred or assigned out of the Local 175 bargaining unit in violation of Section 8(a)(1) and (5) of the Act.

1. The scope of NY Paving's obligation to bargain with Local 175

It is well-settled that where employees are represented by a union, an employer violates Section 8(a)(1) and (5) of the Act by making unilateral changes with respect to mandatory subjects of bargaining absent bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). The duty to bargain attaches only where the unilateral change is "material, substantial and significant" and affects the terms and conditions of employment for the bargaining unit employees. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2001). The transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining. *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 4 (2018), citing *Regal Cinemas, Inc.*, 334 NLRB 304, 312–313 (2001), enf'd. 317 F.3d 300 (D.C. Cir. 2003); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 at p. 11 (2017). Thus, an employer may not transfer or assign bargaining unit work to non-bargaining unit employees without providing the union with

[31] NY Paving does not address the alleged unilateral transfer of flagging work on milling and paving crews in its posthearing brief.

notice and the opportunity to bargain.

The record here establishes that work involving the placement of temporary and permanent asphalt is covered by both Local 175's certification as collective-bargaining representative and the July 1, 2014, through June 30, 2017 collective-bargaining agreement between Local 175 and NY Paving. Local 175's certification applies to "workers who primarily perform asphalt paving," and its collective-bargaining agreement with NY Paving covers "preparing for and performing all types of asphalt work." ALJ Exh. 1 at p. 9; see also *New York Paving, Inc.*, JD–33–19 at p. 4; *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3. The collective-bargaining agreement's description of bargaining unit work also includes "temporary asphalt paving necessary on streets, sidewalks…and federal, city, local and state roads." (ALJ Exh. 1 at p. 9.) The record further establishes that prior to 2018, NY Paving assigned all work involving the placement of asphalt to members of Local 175. See *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 at p. 11 (prohibition on assignment of bargaining unit to work to non-bargaining unit employees applies to established past practices regarding work assignment even if such past practices were not explicitly articulated in the collective-bargaining agreement). Thus, NY Paving was not permitted to assign work involving the placement of temporary or permanent asphalt to employees outside of the Local 175 bargaining unit, absent the consent of Local 175 or bargaining to impasse.

NY Paving does not contend that it had no general obligation to bargain with Local 175 over any transfer of work encompassed by the bargaining unit description contained in the expired contract.[32] NY Paving requests, however, that I draw an adverse inference based upon General Counsel's failure to introduce the July 1, 2014 through June 30, 2017 collective-bargaining agreement between Local 175 and NY Paving into evidence. (R. posthearing brief at 19–21.) I do find General Counsel's failure to introduce the contract between Local 175 and NY Paving perplexing. I ultimately determined that the collective-bargaining agreement's unit description constituted significant evidence regarding the scope of NY Paving's bargaining obligation, and admitted the contract on that basis as an exhibit in an order dated December 10, 2019, which is attached to this decision. (ALJ Exh. 1.) In addition, General Counsel's posthearing brief contains specific representations regarding the contract that were impossible to evaluate without reviewing the language of the contract itself.[33]

Ultimately, however, Respondent does not contend that it had no obligation to bargain regarding the work described in the collective-bargaining agreement. Furthermore, Respondent does not argue that the Board inaccurately recounted the contract's description of bargaining unit work in its August 24, 2018 10(k) decision. See *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3. Indeed, Respondent relies on the Board's award of work in the 10(k) decision to argue that NY Paving was permitted to assign Code 49 and Code 92 work to Local 1010. Respondent also does not argue that its assignment of the work at issue in this case was permissible pursuant to any management rights clause contained in its collective-bargaining agreement with Local 175. Finally, NY Paving had adopted the Local 175 contract, and could have introduced the contract into evidence itself had it so desired. See *Miramar Sheraton Hotel*, 336 NLRB 1203, 1229 (2001) (declining to draw adverse inference based upon failure to introduce document equally available to all parties); *Iron Workers Local 75 (Defco Construction)*, 268 NLRB 1453, 1456 fn. 8 (1984) (same). As a result, I decline to draw an adverse inference based upon General Counsel's failure to introduce Local 175's collective-bargaining agreement into the record.

2. Flagging work on milling and paving crews

General Counsel contends that NY Paving unlawfully transferred flagging work on milling and paving crews, formerly performed by Local 175–represented asphalt workers, to Local 1010–represented concrete workers and to Di-Jo Construction employees not represented by any union. General Counsel contends in her posthearing brief that NY Paving "ultimately admitted" transferring flagging work on milling and paving crews out of the Local 175 bargaining unit. Posthearing brief at 42. However, General Counsel points to no testimony or admissions on NY Paving's part to support such an assertion. In fact, Miceli testified that NY Paving *stopped* assigning Di-Jo Construction and Local 1010–represented workers flagging work on milling and paving crews in late 2017 or early 2018.[34] (Tr. 983.) Because Local 175 filed the charge in Case No. 29–CA–134894 on January 29, 2019, this took place long before the inception of the 6-month period for filing unfair labor practice charges contained in Section 10(b) of the Act.

General Counsel points to the testimony of Jordan and Holder to establish that Di-Jo Construction employees were assigned flagging work on milling and paving crews. Posthearing brief at 19–20. However, Holder testified that Di-Jo Construction employees had done so during "some periods of time" when "a crew is short," without elaborating on the specific time-frame involved. (Tr. 224–225.) This is consistent with Miceli's testimony that Di-Jo Construction and Local 1010–represented workers were assigned flagging on milling and paving jobs, but does not contradict Miceli's assertion that the practice ceased in early 2018. Therefore, the sole evidence that such assignments were made in 2018 is Jordan's vague and contradictory testimony. Asked on direct examination whether he was assigned flagging work with a Local 175 crew, Jordan initially responded,

[32] NY Paving does not argue, for example, that Local 175 lost majority support or that the obligation to bargain did not survive the expiration of the July 1, 2014 through June 30, 2017 collective-bargaining agreement for any other reason.

[33] For example, General Counsel's posthearing brief states that General Counsel is "relying on the prior collective-bargaining agreements whose terms would continue to apply if there were no subsequent contract," and that the "collective bargaining agreement clearly includ[ed] asphalt paving in its description of covered work and otherwise did not have a management rights clause." (GC posthearing brief at p. 13, fn. 6, and at p. 42, fn. 20.)

[34] Zaremski testified that he was not aware of Di-Jo Construction employees having performed flagging work on milling and paving crews, and Sarro was not specifically questioned regarding flagging in connection with asphalt work. Tr. 550–551, 834–835. As discussed previously, Sbarra did not testify at the hearing.

"All the time, yeah . . . doing the flagging." (Tr. 64.) Asked when that occurred, Jordan responded, "like, say, there's no work available, like no dig-out, and something might come up to flagging…That's when he just put me down, go to flagging for like a week or two, and then we see if something come up, I'll give you the work." Id. Only on cross-examination, after he was referred to his affidavit, did Jordan testify that he was assigned to flagging work on milling and paving crews in July 2018. (Tr. 128–129.) While Jordan's payroll history indicates that he worked for approximately three weeks in July 2018, it does not indicate what type of work he performed, and there is no other evidence in the record to establish that his work at the time consisted of flagging on milling and paving crews. Given Jordan's overall lack of reliability as a witness, I find his testimony insufficient to rebut the more credible assertions of Miceli that Di-Jo Construction and Local 1010–represented employees ceased performing flagging work on milling and paving crews in late 2017 or early 2018, outside the Section 10(b) period. As a result, the record does not establish that NY Paving transferred flagging work on milling and paving crews outside the Local 175 bargaining unit within the 10(b) period.

3. Emergency keyhole work

Miceli admitted during his testimony that NY Paving began assigning all emergency keyhole work, including work involving asphalt paving, to Local 1010–represented workers in early 2018. (Tr. 885.) NY Paving does not dispute that the asphalt portion of the emergency keyhole work, once performed by Local 175–represented asphalt workers, is now performed by concrete workers represented by Local 1010. Instead, NY Paving asserts several affirmative defenses with respect to the assignment of emergency keyhole work. (R. posthearing brief at 65–74.) NY Paving contends that Local 175's charge regarding the unlawful transfer of emergency keyhole work is time-barred pursuant to Section 10(b) of the Act. NY Paving also argues that it had no duty to bargain regarding the assignment of emergency keyhole work to concrete employees represented by Local 1010 because it had no control over Hallen's, and ultimately ConEd's, requirement that all employees used on subcontracted projects be represented by a labor union affiliated with the NYCBTC. Finally, NY Paving claims that the amount of asphalt paving involved in the emergency keyhole work is so negligible that the transfer of that work out of the Local 175 bargaining unit was *de minimis*, as opposed to material and significant.

For the following reasons, the evidence does not substantiate these various defenses. As a result, the evidence establishes that NY Paving violated Section 8(a)(1) and (5) of the Act by assigning the asphalt paving component of the emergency keyhole work to non-bargaining unit employees without notifying Local 175 and providing Local 175 with the opportunity to bargain.

a. The Charge in Case No. 29–CA–234894 was not untimely pursuant to Section 10(b) of the Act

NY Paving argues that the allegation that it unlawfully transferred emergency keyhole work out of the Local 175 bargaining unit is time-barred, in that Local 175 had clear and unequivocal notice of the transfer in the spring of 2018, more than 6 months prior to its filing the charge in Case No. 29–CA–234894 on January 29, 2019. For the following reasons, the evidence does not establish that Local 175 had legally operative notice of the transfer of emergency keyhole work more than 6 months prior to filing the charge, and this defense must be rejected.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." It is well-settled that the 10(b) period begins "only when a party has clear and unequivocal notice of a violation of the Act." *Taylor Ridge Paving & Construction*, 365 NLRB No. 168 at p. 3 (2017), quoting *A & L Underground*, 302 NLRB 467, 468 (1991). A respondent raising Section 10(b) as an affirmative defense bears the burden to establish that the charging party had clear and unequivocal notice of the violation at issue. Id. In order to do so, the evidence must demonstrate that the charging party had actual or constructive knowledge of the violation—that the conduct violating the Act was sufficiently "open and obvious" to provide clear notice, or that the unlawful conduct would have been discovered through the exercise of reasonable diligence. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enf'd. 483 F.3d 628 (9th Cir. 2007), quoting *Duke University*, 315 NLRB 1291, fn. 1 (1995). Furthermore, the 10(b) period does not apply where a charging party's delay in filing is engendered by "conflicting signals or otherwise ambiguous conduct by the other party." *Taylor Ridge Paving & Construction*, 365 NLRB No. 168 at p. 3, quoting *A & L Underground*, 302 NLRB at 468; see also *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794, 809–810 (2014), enf'd. 657 Fed.Appx. 129 (3d Cir. 2016) (collecting cases); *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994), enf'd. 98 F.3d 892 (6th Cir. 1996).

The evidence here does not establish that Local 175 had clear and unequivocal notice of the transfer of the emergency keyhole work out of its bargaining unit prior to onset of the 10(b) period. Holder did testify, as NY Paving contends, that the truck he typically used on jobs was set up for asphalt paving by employees represented by Local 1010. (R. posthearing brief at 67; Tr. 247–251.) I further find, as argued by NY Paving, that this occurred in April 2018, as set forth in Holder's affidavit, and not in late 2018 or early 2019, given Holder's admission that his recollection was affected by subsequent medical treatment.[35] (Tr. 251–252, 327–330, 333.) The record also establishes that Holder contacted Priolo and Franco regarding this incident. (Tr. 331–332.) However, Holder testified that he did not know whether the asphalt work his truck was being prepared for was emergency keyhole work, and did not know what work the Local 1010–represented employees ultimately performed with it. (Tr. 338.)

Holder's e-mails admitted into the record as Respondent's Exhibit 24 after the hearing closed also do not establish clear and unequivocal notice that NY Paving had transferred the asphalt

[35] Local 175 Business Manager Charlie Priolo testified that he first spoke with Holder regarding an incident involving the transfer of bargaining unit work in late 2018 or early 2019. (Tr. 380, 383–384.) However, Priolo's testimony in this regard does not establish that the transferred work he discussed with Holder was emergency keyhole work. Id. NY Paving's contention in its motion to reopen that this discrepancy establishes that Priolo perjured himself during the hearing is rejected.

paving involved in emergency keyhole work out of the Local 175 bargaining unit. Holder's April 21, 2018 e-mail indicates that he informed Priolo and Franco that, "1010 went out with three crews today. One in Manhattan, the Bronx and one in Bklyn. Sent pictures of one of the crews working to both Charlie and Anthony, as well as the daily list." (R. Exh. 24.) However, there is no indication as to whether any of these crews were performing emergency keyhole work, or which of the three crews Holder photographed. Holder's May 4, 2018 e-mail states, "Miguel Nieves called to say he saw 1010 working in the Bronx at 233 st.," but also does not indicate whether the job Nieves observed consisted of emergency keyhole work. (R. 24; see also Tr. 330–331, 334–335.) While the record supports NY Paving's contention that emergency keyhole work primarily took place in the Bronx, the evidence does not conclusively establish that *all* work performed by NY Paving in the Bronx was necessarily emergency keyhole work. (Tr. 431.) Holder's May 7, 2018 e-mail simply states, "1010 went out on Sunday night (Scrappy) concrete and asphalt," without any mention of where the asphalt work was performed or for what client. (R. Exh. 24.) Thus, Holder's e-mails establish that he observed one specific occurrence of Local 1010–represented employees performing asphalt work and heard of two others, and that some of this work occurred in the Bronx. They do not demonstrate that Local 175 was aware of a wholesale, permanent transfer of the asphalt component of the emergency keyhole work out of the Local 175 bargaining unit. Thus, they are not inconsistent overall with Chaikin's testimony that prior to the hearing before Judge Gollin the evidence Local 175 was able to obtain regarding the transfer of emergency keyhole work consisted primarily of "rumors" that such work was being assigned to employees represented by Local 1010. (Tr. 678–679, 684–685.)

NY Paving further argues that it provided Local 175 with clear and unequivocal notice that the asphalt paving involved emergency keyhole work had been transferred to workers represented by Local 1010 via its action for a declaratory judgment filed in the United States District Court for the Eastern District of New York on May 18, 2018. (R. posthearing brief at 65–66; R. Exh. 20.) However, nothing in NY Paving's complaint unequivocally indicates that the asphalt component of the emergency keyhole work was being assigned to Local 1010–represented concrete crews at that point. For example, the complaint states that "NYP[36] intends to service all present and future agreements with Con-Edison using only Local 1010 workers," not that such work was already being assigned exclusively to Local 1010–represented employees. (R. Exh. 20, ¶ 13.) To the contrary, the complaint states that "Currently, NYP cannot accept significant Con-Edison asphalt paving work because of Local 175's demand that its workers be permitted to perform the work," and that "It was never envisioned by Local 175 or NYP that Local 175 would be banned from performing work on behalf of Con-Edison." (R. Exh. 20, ¶¶ 42, 72.) NY Paving then describes itself as "being unable to service contracts that would have been and/or are in the process of being awarded to NYP by Con-Edison" as a result of its collective-bargaining relationship with Local 175. (R. Exh. 20, ¶ 77.) The complaint therefore gives the overall impression that NY Paving was precluded from performing asphalt paving work for ConEd as a result of its contractual obligations to Local 175, and not that it was assigning emergency keyhole work to non-bargaining unit employees at the time. Such language did not provide Local 175 with clear and unequivocal notice that emergency keyhole work involving asphalt paving was being assigned out of the Local 175 bargaining unit as of May 18, 2018.

The record also establishes that Local 175 exercised due diligence in attempting to determine whether NY Paving was transferring bargaining unit work to non-bargaining unit employees. Indeed, the evidence establishes that Local 175 has consistently pursued investigations and claims regarding NY Paving's assignment of asphalt paving work out of the Local 175 bargaining unit. In November 2017, Local 175's attorney, Eric Chaikin, filed a grievance regarding the assignment of asphalt paving work covered by Local 175's contract to employees represented by Local 1010. (Tr. 638–639, 641–642, 654–655; R. Exh. 9; GC Exh. 22.) Local 175 pursued this grievance, which was resolved when NY Paving paid amounts representing contributions to the relevant benefit funds as would have been contractually required had the work been performed by Local 175 members. (Tr. 642–644; 654–655; GC Exh. 23.) Furthermore, nothing in the record indicates that this grievance or its resolution involved emergency keyhole work pursuant to the Hallen subcontract.

In addition, Local 175 filed unfair labor practice charges on February 26, 2018, and March 26, 2018, alleging that NY Paving was transferring or assigning bargaining unit work to non-unit employees. (Tr. 663, 666–670; R. Exhs. 7, 8.) Chaikin testified that Local 175 withdrew these allegations after the Regional Director determined that they would otherwise be dismissed, and that he therefore directed Local 175's representatives to attempt to obtain additional evidence. (Tr. 666–669, 671–672, 673, 675–676.) One of the withdrawn allegations, regarding NY Paving's failure to maintain a contractually-required crew size for asphalt paving, was arbitrated in early 2019, with Local 175 prevailing. (Tr. 666, 1051–1052; R. Exh. 22, p. 2–3.) Other allegations became part of the complaint issued by Region 29 on May 30, 2018, and eventually adjudicated by Judge Gollin. See *New York Paving, Inc.*, JD–33–19, at p. 2. The Board has previously held that a union's filing of unfair labor practice charges alleging unlawful unilateral changes that are later withdrawn in lieu of dismissal belies a finding that the union failed to exercise due diligence in pursuing such claims. See *O'Neill, Ltd.*, 288 NLRB 1354, 1356 (1988), enfd. 965 F.2d 1522 (9th Cir. 1992); *Land Air Delivery*, 286 NLRB 1131, 1154 (1987). And in any event, there is nothing in the record to indicate that these charges involved emergency keyhole work.

I note as well that the nature of NY Paving's business, which requires that crews work at many different job sites throughout the five boroughs of New York City, with locations changing on a daily basis, made Local 175's unilateral transfer allegations particularly difficult to substantiate. These numerous, constantly changing work locations precluded Local 175 from discovering the alleged unilateral transfer of asphalt paving work by simply

[36] "NYP" is used in the complaint as an abbreviation for New York Paving. (R. Exh. 20, p. 1.)

"monitoring the shop." See *Comcraft, Inc.*, 317 NLRB 550, 550, fn. 3 (1995) (union would not have been aware of new employees where employer's work force "did not work at one facility" but was "dispatched to other sites for varying periods of time"). Furthermore, in the Long Island City yard different supervisors—Zaremski and Sarro, respectively—assigned asphalt and concrete work and different shop stewards—Holder for Local 175 and Sbarra for Local 1010—interacted with their union's members. As a result, Holder would not necessarily have known from his activities at the Long Island City Yard whether Local 1010–represented employees were being assigned asphalt work, where they were performing such work, or how frequently this was occurring. Thus, Local 175, in the person of Priolo, was forced to literally stalk NY Paving's trucks from the Long Island City yard to individual job sites in order to determine whether Local 1010–represented concrete workers were performing asphalt paving work. (Tr. 364–368, 372–377; GC Exh. 13, 14, 16.) And even when Local 175 discovered that this was in fact the case, there was no way to determine whether it constituted an anomalous incident or a coherent policy on NY Paving's part of assigning asphalt paving work to Local 1010–represented employees.

As a result, nothing in the record contradicts Chaikin's testimony that apart from unsubstantiated rumors, Local 175 first learned that Local 1010 crews were being consistently assigned emergency keyhole work involving asphalt paving when Miceli testified to that effect on September 21, 2018, at the hearing before Judge Gollin. (Tr. 678–679, 684–685; R. Exh. 23.) Nor does the evidence contradict Chaikin's testimony that the January 29, 2019 charge in the instant case was filed based on Miceli's September 21, 2018 testimony that NY Paving was sending a crew out to perform asphalt paving as part of the emergency keyhole work three times per month. (Tr. 678–679; R. Exh. 23.) For all of the foregoing reasons, NY Paving has failed to satisfy its burden to establish that it provided Local 175 with clear and unequivocal notice that it had permanently transferred work covered by its collective-bargaining relationship with the union to non-bargaining unit employees. NY Paving has further failed to establish that Local 175 could have discovered the unilateral transfer of work outside the 10(b) period had it exercised due diligence. As a result, the charge in Case No. 29–CA–234894 is not time-barred with respect to the emergency keyhole work.

b. NY Paving was not excused from its obligation to bargain because it lacked control over the terms of the Hallen subcontract

NY Paving further argues that it had no duty to bargain regarding the transfer of emergency keyhole work out of the Local 175 bargaining unit because it had no control over ConEd's requirement, incorporated into the Hallen subcontract effective January 1, 2018, that work be performed only by members of unions affiliated with the NYCBTC. However, it is well-settled that bargaining is excused in such cases only where "extraordinary" and "unforeseen" events "having a major economic effect" demand that a business "take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995); see also *Ardit Co.*, 364 NLRB No. 130 at p. 5 (2016). For example, in *Ardit Co.*, the Board found that unilateral layoffs were not justified even though the Respondent business "lost a major contract" after a stop-work order and "its bid for another contract was unsuccessful." 364 NLRB No. 130 at p. 5. Indeed, the Board has found that adverse business circumstances such as "loss of significant accounts or contracts" and "operation at a competitive disadvantage" are insufficient to obviate a bargaining obligation unless the evidence establishes "a dire financial emergency."[37] *RBE Electronics of S.D.*, 320 NLRB at 81, citing *Farina Corp.*, 310 NLRB 318, 321 (1993) (loss of a customer account), and *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994), enf'd. 136 F.3d 727 (11th Cir. 1998).

Here, NY Paving introduced no evidence to establish that a "dire financial emergency" necessitated its immediate transfer of the emergency keyhole work out of the Local 175 bargaining unit. Indeed, the evidence demonstrates that NY Paving performs significant work for National Grid in addition to the emergency keyhole work it performs under the Hallen subcontract. Furthermore, Miceli claimed that the street component of the emergency keyhole work requiring asphalt paving constituted only 10 percent of 20 percent of the emergency keyhole work performed pursuant to the Hallen subcontract, as discussed below. As a result, the evidence overall establishes that the scenario faced by NY Paving with respect to the emergency keyhole work and the Hallen subcontract is similar to the adverse business consequences that the Board has found insufficient to establish a dire financial emergency requiring immediate action in the cases discussed above. Therefore, compelling economic circumstances did not excuse NY Paving's obligation to bargain regarding the transfer of emergency keyhole work out of the Local 175 bargaining unit.

c. The transfer of the emergency keyhole work was a material, substantial and significant change creating an obligation to bargain

As discussed above, the duty to bargain attaches only where a unilateral change is "material, substantial and significant." *North Star Steel Co.*, 347 NLRB at 1367. General Counsel bears the burden to establish that the unilateral change at issue meets these criteria. Id. Here, the General Counsel has adduced evidence adequate to demonstrate that the transfer of the emergency keyhole work constituted a material, substantial, and significant change pursuant to the applicable caselaw.

[37] Given the weight of this countervailing authority, the Board's decision in *Southern Mail, Inc.*, 345 NLRB 644, 645, fn. 8 (2005), cited by NY Paving, is not persuasive. *Exxon Research & Engineering Co. v. NLRB*, 89 F.3 228 (5th Cir. 1996), also cited by NY Paving, involved changes made in an employee benefit plan subject to the Employee Retirement Income Security Act by the plan's trustees, and is therefore inapposite. In any event, the Board found that the employer's unilateral changes violated Sec. 8(a)(1) and (5). See *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). It is well-settled that the Board generally adheres to a "nonacquiescence policy" with respect to appellate court decisions that conflict with Board law, unless the Board precedent is reversed by the Supreme Court. See, e.g., *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007).

It is well-settled that the transfer of bargaining unit work to employees outside the bargaining unit constitutes a "material, substantial and significant" change engendering a bargaining obligation. See, e.g., *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2, citing *Regal Cinemas*, 334 NLRB 304 (2001). The Board has repeatedly found that a transfer of bargaining unit work is material, substantial and significant even where there is no evidence that bargaining unit employees were laid off as a result, and no evidence of any impact on their wages and hours. See, e.g., *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (no evidence of impact on employee compensation necessary to establish substantial and material change due to transfer of bargaining unit work); *Comau, Inc.*, 364 NLRB No. 48 at p. 21 (2016) (same); *Mi Pueblo Foods*, 360 NLRB 1097, 1097–1099 (2014) (transfer of bargaining unit work material and substantial even absent layoffs or significant impact on wages and hours for bargaining unit employees). The Board has stated that it is "plain" that a bargaining unit "is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit." *Overnite Transportation Co.*, 330 NLRB 1275, 1276, aff'd. and rev'd. in part, 248 F.3d 1131 (3d Cir. 2000); see also *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (General Counsel "met his burden" to establish a substantial and material change "by showing that the Respondent transferred barge menu work—which had been exclusively performed by unit employees—to nonunit employees").

NY Paving argues that the asphalt component of the emergency keyhole work constitutes only a small portion of the work it performs for Hallen pursuant to the ConEd subcontract. Miceli testified that only 20 percent of the emergency keyhole work is performed on streets and therefore involves the placement of asphalt. Miceli further stated that ten of the twelve inches excavated in the street in question is replaced with concrete, with only the remaining two inches consisting of asphalt "top." Miceli testified, and NY Paving argues, that this amounts to 10 percent of the emergency keyhole work performed on streets, or 10 percent of 20 percent of the emergency keyhole work overall. However, Miceli also testified that the emergency keyhole work required a four-person "top" crew performing asphalt work approximately three to four times a month, for a total of fifteen hours of paving. (Tr. 583–584.) I find the latter testimony to be the more accurate assessment of the actual asphalt work traditionally assigned to Local 175 and encompassed by its collective-bargaining agreement pursuant to the emergency keyhole contract. This amount of transferred bargaining unit work constitutes a substantial, material and significant change sufficient to create a bargaining obligation. See *Ruprecht Co.*, 366 NLRB No. 179 at p. 1, fn. 1, and at p. 14 (2018) (transfer of bargaining unit work to "7 temporary employees out of a total complement of about 92 employees" a material, substantial and significant change requiring bargaining).

Finally, I find that *North Star Steel Co.*, 347 NLRB 1364 (2006), cited in the parties' posthearing briefs, is inapposite here. In that case, the Board determined that a single transfer of work involving .006 percent of the Respondent's total production of steel for the month did not constitute a material, substantial and significant change creating an obligation to bargain. *North Star Steel Co.*, 347 NLRB at 1367–1368. The miniscule fraction of the production and work at issue in *North Star Steel* is not comparable to the three to four days of work per month for four Local 175–represented employees in the instant case. Furthermore, the transfer of production in *North Star Steel* was an isolated incident occurring in one month only. *North Star Steel Co.*, 347 NLRB at 1367. Here, by contrast, the emergency keyhole work has been ongoing since January 2018, when NY Paving transferred the asphalt component of that work out of the Local 175 bargaining unit, and there is no evidence that it will not continue in this manner in the future. As a result, the scenario addressed by the Board in *North Star Steel* is fundamentally different from the circumstances at issue here.

For all of the foregoing reasons, the evidence establishes that General Counsel has met her burden to demonstrate that the transfer of asphalt paving involved in the emergency keyhole work constituted a material, substantial and significant change engendering an obligation to bargain with Local 175. Because the other affirmative defenses raised by NY Paving are not substantiated by the record evidence as discussed above, NY Paving's unilateral transfer of the asphalt component of the emergency keyhole work to employees outside of the Local 175 bargaining unit violated Section 8(a)(1) and (5) of the Act.

4. Code 49 work

NY Paving concedes, as Miceli testified, that concrete workers represented by Local 1010 have performed all of the Code 49 work since the code was created in the summer of 2018. NY Paving contends, however, that it was permitted to assign the Code 49 work to Local 1010–represented concrete workers pursuant to the Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 (2018). NY Paving argues that the Code 49 work was therefore never subject to the Local 175 contract, and that NY Paving was under no obligation to bargain. (R. posthearing brief at 74–78.)

The evidence overall does not establish that the Code 49 work was properly assigned out of the Local 175 bargaining unit pursuant to the Board's decision in the 10(k) case. The evidence conclusively establishes that asphalt paving work is encompassed by the collective-bargaining relationship between Local 175 and NY Paving. Local 175's certification covers employees "who primarily perform asphalt paving," and its contract specifically covers "prepar[ing] for and perform[ing] all types of asphalt paving," including "temporary asphalt paving." *New York Paving, Inc.*, JD–33–19 at p. 4; ALJ Exh. 1 at p. 9; see also *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3. Miceli himself testified in the instant case that Local 175 represents "asphalt workers," and NY Paving states in its posthearing brief that Local 175's members "perform asphalt paving work." (Tr. 838; R. posthearing brief at p. 2; see also *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 1 ("Historically… Local 175 has represented the employees who primarily perform asphalt work").) Thus, the evidence establishes that work involving both temporary and

permanent asphalt is covered by the collective-bargaining agreement between Local 175 and NY Paving. Nothing in the Board's 10(k) decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)* permits the assignment of asphalt paving work to employees outside the Local 175 bargaining unit. See *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 at p. 11 (rejecting contention that previous 10(k) decision "authorizes a change that would deprive" union's member of work "that it was the established past practice for them to perform").

The evidence further demonstrates that Code 49 work involves asphalt paving. Miceli's own testimony establishes that the Code 49 work consists of the placement of temporary asphalt in a cut to replace two to three inches of backfill and temporary asphalt left by National Grid, so that saws can be run over it without causing hazardous conditions or being damaged. Although NY Paving's posthearing brief refers to "temporary material" being placed in the cut as part of a Code 49, Miceli and Zaremski's testimony makes clear that temporary asphalt is being used. (R. posthearing brief at p. 76–77; Tr. 509–510, 980–981, 1008–1009.)

NY Paving argues that Code 49 work is only performed to stabilize the area of a street for sawcutting, the initial component of the excavation process, and both sawcutting and excavation work were awarded to Local 1010 by the Board. NY Paving contends that Code 49 work therefore constitutes the first step in the excavation work awarded to Local 1010 in the 10(k) decision. (R. posthearing brief at 76–77.) This argument is unavailing for several reasons. First of all, the evidence does not support a contention that the Code 49 work—the placement of temporary asphalt—is only performed in the context of the sawcutting and excavation process. The record establishes that Local 175–represented employees place temporary asphalt in other circumstances which will be followed by further work at the site. For example, Holder and Miceli both testified that binder, or temporary asphalt, is placed by Local 175–represented crews prior to finishing a street to grade with "top" asphalt. (Tr. 228, 592–593.) NY Paving does not claim that all work involving temporary asphalt as opposed to permanent asphalt "top" is covered by Local 1010's collective-bargaining agreement or is appropriately assigned to Local 1010–represented employees pursuant to the Board's 10(k) decision.

Furthermore, the evidence does not establish that the sawcutting and dig-out follow a Code 49 so quickly that the entire repair comprises one distinct work process, as NY Paving contends. For example, in his testimony Miceli described the amount of time between a Code 49 and the sawcutting, dig-out, and completion of the overall job by referring to the average amount of time for completion of *any* NY Paving job. (Tr. 878.) Ultimately, Zaremski and Miceli both testified that the temporary asphalt placed as part of a Code 49 is typically sawcut and dug out about a week to ten days after the Code 49 work itself is performed. Furthermore, Miceli testified although the sawcutting and dig out would follow a Code 49 within days, asphalt "top" is placed by Local 175–represented employees "within hours" of an excavation performed by members of Local 1010. (Tr. 981.) Thus, the evidence overall contradicts Respondent's assertion that the sawcutting and dig-out follow a Code 49 in so rapid and integral a manner that the entire project constitutes one uniquely coherent work process.

In addition, the Board rejected similar reasoning in analyzing the language of Local 175 and Local 1010's unit certifications and collective-bargaining agreements in its 10(k) decision. *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 3. The Board noted there that both contracts could be "fairly read to cover off of the disputed work" in that case. Id. Specifically, the Board stated that language in the Local 175 contract including work involved in "prepar[ing] for . . . all types of asphalt paving" could encompass "sawcutting and excavation," which must take place prior to the ultimate placement of asphalt "top." Id. However, the Board found that the unit description language contained in Local 1010's contract "squarely covers excavation," and as a result was more "specific" than the language contained in Local 175's collective-bargaining agreement. Id. The Board therefore determined that the contract language at issue favored awarding the disputed work to Local 1010–represented employees. Id. Thus, Board's analysis in this regard clearly privileged language specifically describing the work at issue over language potentially encompassing the disputed work as part of an overall repair. Here, as discussed above, the Local 175 certification and contract explicitly cover preparation for and performance of all types of asphalt paving. The collective-bargaining agreement's recognition language further encompasses "temporary asphalt paving…on streets, sidewalks and private property." (ALJ Exh. 1, p. 9.) The evidence also establishes that Local 175–represented employees performed all work involved in the placement of asphalt, regardless of the industrial processes that followed in order to complete the overall street or sidewalk repair. Therefore, NY Paving's argument that subsequent concrete work necessary to complete the repair somehow subsumed the temporary asphalt work comprising a Code 49 must be rejected.

For all of the foregoing reasons, the evidence establishes that the Code 49 work is within the purview of NY Paving's collective-bargaining relationship with Local 175, and NY Paving was obligated to bargain with Local 175 prior to assigning it out of the bargaining unit. There is no dispute that NY Paving failed to provide Local 175 with notice and the opportunity to bargain regarding the issue. As a result, the evidence establishes that NY Paving's unilateral assignment of Code 49 work to employees outside of the Local 175 bargaining unit violated Section 8(a)(1) and (5) of the Act.

5. Code 92 work

As with the Code 49 work, NY Paving concedes that concrete workers represented by Local 1010 have performed all of the Code 92 work since fall 2018, including the placement of asphalt. There is no dispute that a Code 92 includes the placement of temporary asphalt in an area so that it can be sawcut prior as part of the subsequent excavation. (Tr. 233, 980–981.) However, NY Paving contends that it was also permitted to assign the Code 92 work to Local 1010–represented workers pursuant to the Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*. NY Paving argues that because Code 92 work is performed only to stabilize a sidewalk for sawcutting and excavation it actually constitutes the

initial phase of the excavation work awarded to Local 1010 by the Board. NY Paving further claims that because sidewalks consist entirely of concrete, any work on them is encompassed by the Board's Decision awarding "any and all concrete work" to Local 1010. R. posthearing brief at 77. Thus, NY Paving contends that it was under no obligation to bargain with Local 175 before assigning the work out to employees not covered by the Local 175 contract.

I find that the Code 92 work, like the Code 49 work, involves the placement of temporary asphalt covered pursuant to NY Paving's collective-bargaining relationship with Local 175. As with the Code 49 work, the evidence does not establish that the Code 92 work was properly assigned to Local 1010–represented concrete crews because the placement of temporary asphalt pursuant to a Code 92 is an inseparable component of a single integrated work process also involving concrete. Nor is there any support for NY Paving's contention that assigning such temporary asphalt work out of the Local 175 bargaining unit is permissible because the finished sidewalk consists entirely of concrete. Thus, NY Paving was obligated to bargain with Local 175 prior to assigning the Code 92 work to employees outside the Local 175 bargaining unit. As there is no dispute that Local 175 was not provided with notice and an opportunity to bargain, NY Paving's unilateral assignment of the Code 92 work to non-bargaining unit employees violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent New York Paving, Inc. is an employer engaged in commerce at its Long Island, New York facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. Construction Council Local 175, Utility Workers Union of America, AFL–CIO ("Local 175") is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 175 has been the certified collective-bargaining representative of Respondent's full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

4. Respondent violated Section 8(a)(5) and (1) of the Act by transferring work subject to its collective-bargaining agreement with Local 175 to non-bargaining unit employees without providing Local 175 with notice and the opportunity to bargain.

5. Respondent has not violated the Act in any other manner alleged in the consolidated complaint.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and take certain affirmative action designed to effectuate the Act's policies.

Having found that Respondent violated Section 8(a)(5) and (1) by unilaterally transferring work subject to its collective-bargaining agreement with Local 175 to non-bargaining unit employees, I shall order Respondent to rescind the unlawful unilateral transfer and restore the status quo ante by transferring the work back to the Local 175 bargaining unit, and to provide Local 175 with notice and an opportunity to bargain. I shall also order Respondent to make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral transfer. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I shall order Respondent to compensate the bargaining unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, a report with the Regional Director for Region 29 allocating the backpay award(s) to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

ORDER[38]

New York Paving, Inc., its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally transferring work subject to its collective-bargaining agreement with Local 175, including emergency keyhole asphalt paving work, "Code 49" work, and "Code 92" work, to non-bargaining unit employees, without first notifying Construction Council Local 175, Utility Workers Union of America, AFL–CIO, and providing Local 175 with the opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral transfer of work subject to the collective-bargaining agreement with Local 175, including emergency keyhole asphalt paving work, "Code 49" work, and "Code 92" work, to non-bargaining unit employees.

(b) Before transferring the work of bargaining unit employees to employees outside the bargaining unit, notify and, on request, bargain with Local 175 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

(c) Make whole the bargaining unit employees for any lost wages and benefits resulting from the transfer of work subject to

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the collective-bargaining agreement with Local 175, including emergency keyhole asphalt paving work, "Code 49" work, and "Code 92" work, to non-bargaining unit employees, with interest, in the manner set forth in the remedy section of this decision.

(d) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or by a Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(f) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the Long Island City facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 1, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. January 27, 2020

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT transfer work subject to our collective-bargaining agreement with Construction Council Local 175, Utility Workers Union of America, AFL–CIO, including emergency keyhole asphalt paving work, "Code 49" work, and "Code 92" work, to non-bargaining unit employees, without first notifying Local 175 and providing Local 175 with the opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful unilateral transfer of work subject to the collective-bargaining agreement with Local 175, including emergency keyhole asphalt paving work, "Code 49" work, and "Code 92" work, to non-bargaining unit employees, until such time as Local 175 has been afforded an opportunity to bargain to an agreement or bona fide impasse over the transfer of such bargaining unit work.

WE WILL before implementing any changes in wages, hours, or other terms and conditions of employment for bargaining unit employees, notify and, on request, bargain with Local 175 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

WE WILL make whole bargaining unit employees for any lost wages and benefits resulting from the unlawful unilateral transfer of work subject to the collective-bargaining agreement with Local 175, less any net interim earnings, plus interest.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

NEW YORK PAVING, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/29-CA-233990 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

ORDER GRANTING MOTION TO REOPEN AND SUPPLEMENTING THE RECORD

The hearing in the above matter took place in Brooklyn, New York, on July 15 through 18, 2019, and August 14, 2019, and briefs were submitted on October 18, 2019. The consolidated complaint alleges in relevant part that New York Paving, Inc. (NY Paving) violated Section 8(a)(1) and (5) by unilaterally transferring work traditionally encompassed by its collective-bargaining agreement with Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175) to non-bargaining unit employees.

On November 13, 2019, NY Paving filed a motion to reopen the record for the admission of newly-discovered documentary evidence. Counsel for the General Counsel (General Counsel) and Local 175 filed oppositions on November 20, 2019, and on November 26, 2019, NY Paving filed a reply. In addition, on November 21, 2019, I notified the parties by e-mail that I intended to supplement the record by introducing the collective bargaining agreement between NY Paving and Local 175 dated July 1, 2014 through June 30, 2017, and allowed the parties to submit written statements regarding the issue. General Counsel and Local 175 have no objection to the admission of the collective bargaining agreement, while NY Paving objects. For the following reasons, NY Paving's motion to reopen the record and admit the documents in question is granted, and the collective bargaining agreement is admitted as well.

1. The motion to reopen the record

NY Paving contends that pursuant to Section 102.48(c)(1) of the Board's Rules and Regulations, a party may file a motion to reopen the record which states "briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." See also *Circus Circus Las Vegas*, 366 NLRB No. 110, at p. 1, fn. 1 (2018). The Board defines newly discovered evidence as evidence "which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Circus Circus Las Vegas*, 366 NLRB No. 110, at p. 1, fn. 1, quoting *Owen Lee Floor Service, Inc.,* 250 NLRB 651, fn. 2 (1980), enfd. 659 F.2d 1082 (6th Cir. 1981); see also *Fitel/Lucent Technologies, Inc.,* 326 NLRB 46, fn. 1 (1998). A motion to admit newly discovered evidence must also present "facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence." Id.

However, this standard, included in the portion of the Rules and Regulations describing "Procedure Before the Board," applies by its terms to "a party to a proceeding before the Board," and involves motions to reopen the record made after a decision has been issued by an administrative law judge. See also *New Otani Hotel & Garden,* 325 NLRB 928, 945–946 (1998). Section 102.35(a)(8), listed under "Hearings," includes as one of the "Duties and powers of Administrative Law Judges" in effect "between the time the Judge is designated and the transfer of the case to the Board" the authority "to order hearings reopened." Here, as in *New Otani Hotel & Gardens,* Post-Hearing Briefs have been submitted, but no ALJ decision has yet issued. 325 NLRB at 928, 945. Thus, while the considerations articulated pursuant to Section 102.48(c)(1) will inform my decision here, the provision itself is not strictly applicable.

NY Paving seeks to reopen the record for the admission of three e-mails sent by Local 175 shop steward Terry Holder on April 21, 2018, May 4, 2018, and May 7, 2018, to an e-mail address maintained by Local 175. NY Paving states that the e-mails were discovered only after the hearing in the instant matter closed, when they were produced by Local 175 on October 24, 2019, in connection with an unrelated arbitration proceeding. In the e-mails, Holder provides information regarding the possible assignment of work covered by Local 175's collective bargaining agreement with NY Paving to employees represented by another union. NY Paving argues that these e- mails tend to show that allegations regarding the unilateral transfer of one particular category of bargaining unit work are time-barred pursuant to Section 10(b) of the Act.

I find that it is appropriate to reopen the record and admit the proffered e-mails. NY Paving did not create or maintain the proffered e-mails in its possession, and only became aware of their existence when Local 175 produced them in the arbitration proceeding after the hearing in this case closed. Compare *Circus Circus Las Vegas*, 366 NLRB No. 110, at p. 1, fn. 1 (records "routinely created and maintained" in Respondent's own computerized system not newly discovered or unavailable at the time of the hearing); *Fitel/Lucent Technologies, Inc.,* 326 NLRB at 46, fn. 1 (declining to reopen the record to admit disciplinary report from Respondent's own records). General Counsel contends that NY Paving could have served a Subpoena *Duces Tecum* on Local 175 requiring the production of documents such as the proffered e-mails. While NY Paving did serve a Subpoena *Duces Tecum* on Local 175, it is unclear from the record whether that Subpoena encompassed e-mails relevant to the alleged unilateral transfer of bargaining unit work. (See Tr. 295-298, 405-411.) In addition, Local 175's compliance with NY Paving's Subpoena was sufficiently inadequate that General Counsel was required to more thoroughly review the Subpoena with Local 175 in order to determine whether a comprehensive search for the materials sought had actually been performed. (Tr. 295-298.) Indeed, Local 175's counsel stated that the Local 175- maintained address to which Holder sent the now-proffered e-mails was "monitored by one person, and not always reviewed." (Tr. 297.) As a result, I find that NY Paving was "excusably ignorant" of the proffered e-mails' existence, and that it acted with reasonable diligence to discover them. NY Paving further acted with reasonable diligence to introduce the proffered e-mails by moving to have them introduced into evidence soon after their receipt in the arbitration proceeding.

I also find that there is an appropriate evidentiary basis for the admission of the proffered e-mails. At the hearing, Holder identified the e-mail address contained on the proffered e-mails as his own personal e-mail address and testified that he maintained such records in the ordinary course of his duties as shop steward. (Tr. 301-302; see also R. Exh. 5(c).) There is no dispute that the address to which the proffered e-mails were sent was maintained by the Local 175, and Local 175 does not dispute their authenticity in its Opposition. (See Tr. 297.) The e-mails, dated April 21, 2018, May 4, 2018, and May 7, 2018, are identical in form,

and similar in the nature of the information they contain, to other e-mails created by Holder and sent from his personal e-mail address to the e-mail account maintained by Local 175. (See, e.g., R. Exh. 5(c).) In terms of relevance, the proffered e-mails all contain notations which NY Paving contends represent reports of non-bargaining unit employees performing work encompassed by Local 175's contract with NY Paving. NY Paving argues that the proffered e-mails tend to establish Local 175's knowledge of a violation outside the 10(b) period, and that the allegation regarding the unlawful unilateral transfer of one particularly type of bargaining unit work is therefore time-barred.

For all of the foregoing reasons, NY Paving's motion to reopen the record is granted, and the dated April 21, 2018, May 4, 2018, and May 7, 2018 e-mails are hereby admitted into the record as Respondent's Exhibit 24.

2. Admission of the collective bargaining agreement dated July 1, 2014 through June 30, 2017

I now turn to the admission of the collective bargaining agreement between NY Paving and Local 175 dated July 1, 2014 through June 30, 2017, to which NY Paving objects. It is my determination that the record in this case simply is not complete without this collective bargaining agreement, the last contract to which NY Paving and Local 175 both accede that they were bound. The collective bargaining agreement constitutes evidence regarding the contours of the alleged bargaining obligation by describing the scope of the bargaining unit out of which the work was allegedly unlawfully transferred. This collective bargaining agreement formed part of the basis for the Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving),* 366 NLRB No. 174 (2018), the interpretation of which is disputed by the parties in connection with the unlawful unilateral transfer allegation here. It was also introduced into evidence in *NY Paving, Inc.,* JD–33–19, decided by Judge Andrew S. Gollin, and NY Paving states in its opposition that it stipulated in that proceeding to having adopted the agreement's terms by conduct. I note in addition that General Counsel makes specific representations in her posthearing brief regarding the contents of the collective bargaining agreement that are impossible to evaluate without recourse to the contract itself.[1]

NY Paving argues in its opposition that the 2014–2017 contract could have been introduced by General Counsel or Local 175 during the testimony of its Business Manager Charlie Priolo. NY Paving has argued in its Post-Hearing Brief that I should draw an adverse inference as a result. However, if NY Paving believes the collective bargaining agreement would have in fact supported its own contentions, it is hard to see why admitting it into the record now would be objectionable. Furthermore, the 2014–2017 contract was adopted by and equally available to NY Paving. NY Paving could have introduced the contract into evidence, cross-examined Priolo or any other witness regarding the contract's terms or presented any other evidence regarding subsequent events which may in its judgment have affected an obligation to bargain. All parties were provided at the hearing with ample opportunity to introduce evidence regarding the nature and scope of the bargaining obligation. Finally, NY Paving refers to its attempt to supplement the record with newspaper articles as an attachment to its revised Exhibit 21, which I rejected, arguing that because these materials were not admitted the collective bargaining agreement should be excluded as well. However, the newspaper articles NY Paving attempted to introduce were rejected for entirely different reasons, as discussed in my September 9, 2019 Order.

As a result, for the reasons discussed above the collective bargaining agreement between NY Paving and Local 175 dated July 1, 2014 through June 30, 2017, is hereby admitted as ALJ Exhibit 1. The parties shall mutually agree upon an authentic copy of the collective bargaining agreement to be submitted to me and to the court reporting service on or before December 17, 2019. If the parties wish to make their submissions regarding the admission of the collective bargaining agreement a part of the record in this matter, they may do so on or before December 17, 2019.

Dated: New York, New York December 10, 2019

[1] General Counsel states that she is "relying on the prior collective bargaining agreements whose terms would continue to apply if there were no subsequent contract," and that the "collective bargaining agreement clearly includ[ed] asphalt paving in its description of covered work and otherwise did not have a management rights clause." GC posthearing brief at p. 13, fn. 6, and at p. 42, fn. 20.